IN THE

Supreme Court of the United States

October Term, 1971

No. .....

STATE OF CALIFORNIA,

Petitioner,

vs.

ROBERT PAGE ANDERSON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of California respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in this proceeding on February 18, 1972, reversing a judgment imposing the death penalty on the ground that "capital punishment is both cruel and unusual."[1]

Opinions Below

The majority and dissenting opinions of the California Supreme Court, copies of which are set forth as Appendix B to this Petition, are reported as *People v. Anderson*, 6 Cal. 3d 628 [100 Cal. Rptr. 152, 493 P.2d 880] (1972). The modification of opinion and order filed on denial of petitioner's Petition for Re-

[1]Appendix B, *infra*, p. 28; *People v. Anderson*, 6 Cal 3d 628, 633 [100 Cal. Rptr. 152, 155, 493 P.2d 880, 883] (1972).

hearing are set forth respectively as Appendix C and Appendix D herein.

Jurisdiction

The judgment of the California Supreme Court which is sought to be reviewed was entered on February 18, 1972, that court entering further orders on March 17, 1972, modifying the court's opinion, denying petitioner's petition for rehearing, and denying petitioner's application for stay of the remittitur. (*See* Appendix C, D, and E, *infra.*) The present Petition for Writ of Certiorari is filed within the required ninety-day period following entry of final judgment.

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3), since under the California Supreme Court's decision state statutes are drawn in question on the ground of their being "cruel and unusual" punishment, which punishment is barred by the Eighth Amendment to the Constitution of the United States, and since a right is especially set up and claimed by petitioner under Article IV, section 4, and Amendment XIV of the Constitution of the United States.

Questions Presented

1. Whether the Supreme Court of California has incorrectly held that the death penalty constitutes cruel and unusual punishment under the Eighth Amendment to the federal Constitution, notwithstanding that court's attempt to circumvent the jurisdiction of this Court over federal constitutional questions by purporting to base its decision on a minor difference in wording between otherwise—identical federal and state constitutional provisions treated as identical by the state court prior to the present ruling, where:

(a) The state court did *not* find the death penalty "cruel *or* unusual punishment," the wording of the California Constitution,[2] but expressly held that "capital punishment is *both* cruel *and* unusual,"[3] the Eighth Amendment prohibiting "cruel and unusual punishments;"

(b) The state court conceded that the federal and state constitutional provisions "serve[ ] an identical purpose" and are measured by the same standard;[4]

(c) Legal and semantic authority indicates that a prohibition against "cruel or unusual punishments" cannot mean anything different from a prohibition against "cruel and unusual punishments;" the States are almost equally split in the apparently fortuitous use of the two conjunctions in their constitutional provisions dealing with cruel and unusual punishment; and States have upheld capital punishment upon constitutional wording identical to California's Constitution (Texas one month after California's ruling to the contrary).

2. Whether the decision of the Supreme Court of California has denied the People of the State of California due process of law, equal protection of the laws, and a republican form of government guaranteed under Article IV, section 4, and Amendment Fourteen of the Constitution of the United States, by so violating California's constitutional separation of powers and usurping the legislative function as to deprive the people of their right to have duly elected representatives and executive officers empowered to enact and execute

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[2]Cal. Const. art. I, § 6 (emphasis supplied).

[3]*See* n.1, *infra*. (emphasis supplied.)

[4]Appendix B, *infra*, pp. 38, 50; *People v. Anderson*, 6 Cal. 3d 628, 640, 648 [100 Cal. Rptr. 152, 160, 165, 493 P.2d 880, 888, 893] (1972).

laws for the protection of the lives, liberty, and property of California's citizens.

Constitutional Provisions Involved

United States Constitution, Article IV, Section 4:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

United States Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment XIV, Section 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution, Article I, Section 6:

"All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned."

Statement of the Case

A jury found respondent guilty of first degree murder, the attempted murder of three men (two of them police officers), and first degree robbery, fixing the penalty at death for the murder. The California Supreme Court unanimously affirmed the judgment imposing the death penalty. *People v. Anderson,* 64 Cal. 2d 633 [51 Cal. Rptr. 238, 414 P.2d 366] (1966). The court's opinion fully sets forth the facts underlying respondent's conviction, which evidence is not material to consideration of the present Petition.

Two years later the California Supreme Court issued an order to show cause upon respondent's filing of a petition for writ of habeas corpus "challenging the constitutionality of the death penalty as applied in California." The court upheld the death penalty but set aside the judgment insofar as it imposed the punishment of death, on the basis of this Court's decision in *Witherspoon v. Illinois,* 391 U.S. 510, ordering a retrial on the matter of penalty. *In re Anderson,* 69 Cal. 2d 613, 616-17 [73 Cal. Rptr. 21, 24, 447 P.2d 117, 120] (1968). A petition for writ of certiorari filed by respondent Anderson, seeking review of that decision, is still pending before this Court. *Anderson et al. v. California,* No. 68-5007.

The matter of penalty was retried, and respondent's punishment was again fixed by a jury at death. On automatic appeal to the California Supreme Court, the case was briefed and was argued on February 4, 1970. Subsequent to this Court's granting of certiorari in *Aikens v. California* and three other cases on the issue whether the death penalty constitutes cruel and unusual punishment, 403 U.S. 952, the California Supreme

Court set reargument in the present case for January 6, 1972, (eleven days prior to the date set for the *Aikens* argument) on the limited issue "whether the death penalty constitutes cruel and/or unusual punishment within the meaning of the United States and/or the California Constitutions."

On February 18, 1972, the California Supreme Court (one justice dissenting) reversed respondent's judgment imposing the death penalty, on the ground that "capital punishment is both cruel and unusual." (Appendix B, *infra*, p. 28; *People v. Anderson*, 6 Cal. 3d 628, 633 [100 Cal. Rptr. 152, 155, 493 P.2d 880, 883]). On March 17, 1972, in an order set forth as Appendix D, *infra*, the California Supreme Court denied petitioner's timely Petition for Rehearing, which raised the questions presented in the present Petition and which is set forth as Appendix A, *infra*. On that date the California Supreme Court also issued a modification of its opinion, Appendix C, *infra*, and denied petitioner's Application for Stay of Issuance of the Remittitur. Appendix E, *infra*. On March 20, 1972, this Court denied petitioner's Application for Stay of Enforcement of Judgment. (*California v. Anderson*, A-962.) A Renewed Application for Stay of Enforcement of Judgment is being filed concurrently with the filing of the present Petition.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

The California Supreme Court Has Erroneously Decided That "Capital Punishment Is Both Cruel and Unusual"[5] While That Federal Constitutional Issue Is Under Review by This Court

The California Supreme Court has engaged in an unseemly rush to judgment on the issue whether the death penalty constitutes cruel and unusual punishment while that issue is pending before this Honorable Court.[6] In so doing the California Supreme Court pointedly refuses to "defer [ ] to any other court or to any other branch of government."[7]

In the face of this Court's conclusion that the death penalty is not cruel and unusual punishment[8] and despite the California Constitution's express references to "capital offenses" and offenses "punishable with death,"[9] the California Supreme Court has found the death penalty to be "cruel" and "unusual."

That court states:

> ". . . We have concluded that capital punishment is *both cruel and unusual* as those terms are de-

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[5]Appendix B, *infra*, p. 28; *People v. Anderson*, 6 Cal. 3d 628, 633 [100 Cal. Rptr. 152, 155, 493 P.2d 880, 883] (1972).

[6]See Statement of the Case, *infra*, pp. 5-6; Petition for Rehearing, Appendix A, *infra*, p. 3 & nn. 1, 2.

[7]Appendix B, *infra*, pp. 37-38; *People v. Anderson*, *supra*, 6 Cal. 3d at 640 [100 Cal. Rptr. at 159, 493 P.2d at 887].

[8]*Trop v. Dulles*, 356 U.S. 86, 99 (plurality opinion of Warren, C.J.); *Francis v. Resweber*, 329 U.S. 459, 463-64 (plurality opinion of Reed, J.); *In re Kemmler*, 136 U.S. 436, 447; *Wilkerson v. Utah*, 99 U.S. 130, 134-35.

[9]Appendix B, p. 34; *People v. Anderson*, 6 Cal. 3d at 638 (n. 19) [100 Cal. Rptr. at 58, 493 P.2d at 886].

> fined under article I, section 6, of the California Constitution, and that therefore death may not be exacted as punishment for crime in this state. Because we have determined that the California Constitution does not permit the continued application of capital punishment, we need not consider whether capital punishment may also be proscribed by the Eighth Amendment to the United States Constitution.[1]
>
> "[1]We note that this issue is presently before the United States Supreme Court. (Aikens, Jr. v. California, No. 68-5027; Furman v. Georgia, No. 69-5003; Jackson, Jr. v. Georgia, No. 69-5030.)"[10]

The italicized language in the above-quoted portion of the opinion, and the balance of the court's decision, illustrate that the California Supreme Court has decided the Eighth Amendment issue despite the court's disclaimer that it was deciding only the state constitutional issue of cruel *or* unusual punishment.

The very constitutional history relied upon by the court demonstrates that the choice of conjunctions by the 1849 California Constitutional Convention was haphazard, the proposed provision being changed without explanation from "and" to "or" one month subsequent to the Convention's rejection of a constitutional provision that would have expressly forbidden capital punishment.[11] Nothing cited or advanced by the court in any way indicates that a prohibition against

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[10]Appendix B, p. 28; *People v. Anderson, supra,* 6 Cal. 3d at 633-34 [100 Cal. Rptr. at 155, 493 P.2d at 883] (emphasis supplied).

[11]Appendix B, pp. 28-40; *People v. Anderson, supra,* 6 Cal. 3d at 634-42 [100 Cal. Rptr. at 155-61, 493 P.2d at 883-89].

"cruel *or* unusual punishments" could rationally be interpreted as meaning something different from a prohibition against "cruel *and* unusual punishments."

The late Justice Harlan wrote for this Court that it is a "proposition that the word 'or' is often used as a careless substitute for the word 'and' . . .,"[12] and a noted authority in the field of statutory construction has written that "[T]here has been . . . so great laxity in the use of these terms that courts have generally said that the words are interchangeable."[13]

Nineteen States employ the word "or" in their constitutional prohibitions against cruel and unusual punishment; twenty-two States employ "and," and six States bar only "cruel" punishment.[14] This variance in phrase-

[12]*De Sylva v. Ballentine,* 351 U.S. 570, 573.

[13]Sutherland, 2 Statutes and Statutory Construction 451-52, § 4923 (3d ed. 1943). *See also People v. Mattson,* 51 Cal. 2d 777, 791-92 [336 P.2d 937, 948] (1959); *People v. Wright,* 131 Cal. App. 2d Supp. 853, 862 [281 P.2d 384, 390] (1955); Calif. Agr. Code § 64012.

[14]The nineteen States whose constitutions prohibit "cruel *or* unusual punishment(s)" are: Alabama, Arkansas, California, Florida, Hawaii, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Texas, and Wyoming. The twenty-two States whose constitutions prohibit "cruel *and* unusual punishment(s)" are: Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, South Carolina, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. The six states whose constitutions prohibit only "cruel" punishment are: Delaware, Kentucky, Pennsylvania, Rhode Island, South Dakota, and Washington. Legislative Drafting Research Fund, Columbia University, Constitutions of the United States (1962) and 1961-67 Supp. (1969); Legislative Drafting Research Fund, Columbia University, Index Digest of State Constitutions 343 (2d ed. 1959) and 1958-62 Supp. (1967). Illinois' constitution contains a prohibition against disproportionate punishment. Ill. Const. art. I, § 11 (Smith-Hurd Ill. Ann. Stats. 1971.) Only Connecticut and Vermont have no constitutional provision relating to cruel

(This footnote is continued on next page)

ology is probably as totally fortuitous as the initial composition of the Eighth Amendment.[15] Can it be seriously envisaged that among the original States, North Carolina's use of the word "or" precludes enforcement of the death penalty in that State whereas South Carolina's choice of "and" sanctifies capital punishment in that jurisdiction?

In the event the California Supreme Court's opinion is allowed to escape review by this Court because of the palpably transparent "state ground" of the decision, the absurd result will follow of capital punishment being either judicially allowed or disallowed in various States with identical or nearly-identical constitutional prohibitions against cruel and unusual punishment. By way of illustration, the Indiana Supreme Court held in July of 1971 that capital punishment was not precluded by that state's prohibition against "cruel *and* unusual punishments;"[16] in February of 1972 the California Supreme Court in the present case purported to hold that California's ban on "cruel *or* unusual punishments" precluded capital punishment; and in March of 1972 the Texas Court of Criminal Appeals held that Texas' prohibition against "cruel *or* unusual punishment" does not preclude capital punishment.[17]

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and unusual punishment. But Connecticut makes cruel or unlawful punishment a crime, Conn. Gen. Stats. Ann. §53-20 (West 1960), and Vermont incorporates into state law the common law of England, which in turn prohibits cruel and unusual punishment. Vt. Stats. Ann. tit. 1, §271 (Equity Pub. 1958); *State v. O'Brien*, 106 Vt. 97, 107-08 [170 A. 98, 102] (1934).

[15]*See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839; 840-41 (n. 8) 1969.

[16]*Adams v. State*, [271 N.E. 2d 425, 429] (Ind., 1971).

[17]*Ronnie Earl Tezeno v. State of Texas*, ... S.W. 2d ..... (No. 44, 331, decided March 15, 1972) Slip Opinion, p. 4: "This Court holds to the opinion that it has enunciated many times

A state court is not permitted to interpret federal constitutional rights independently of the fundamental criteria which this Court has engrafted onto the language of the constitutional provision in question. *See Chapman v. California*, 386 U.S. 18, 21: "With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights;" *Ker v. California*, 374 U.S. 23, 30-34 (opinion of Clark, J.); *Jacobellis v. Ohio*, 378 U.S. 184, 194-95: "The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines' . . . It is, after all, a national Constitution we are expounding."

The question squarely presented by this Petition is whether the highest court of a State may defeat the jurisdiction of this Court to review vital federal constitutional issues by purporting to decide the issue on the basis of an identical provision in the state constitution. For clearly there can be no doubt that the California Supreme Court decided the federal "cruel *and* unusual punishment" issue, while purporting to base its decision on California's "cruel or unusual punishment" clause, with the obvious purpose of avoiding that court's recent adverse experiences with the Court's review of California Supreme Court decisions which have attempted to invalidate California constitutional provisions and statutes on federal constitutional grounds. *Cf. Mihaly v. Westbrook*, 403 U.S. 915; *California v.*

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before that under the Constitution of the United States or the State of Texas, that the death penalty is not cruel and unusual punishment."

Byers, 402 U.S. 424, 427; *California v. Green*, 399 U.S. 149, 153.

This Court has held:

> "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support. N.A.A.C.P. v. Alabama, 357 U.S. 449, 455; Staub v. City of Baxley, 355 U.S. 313, 318-320; Ward v. Love County, 253 U.S. 17, 22. . . ."
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> *Wolfe v. North Carolina*, 364 U.S. 177, 185-86. *See also Ancient Egyptian Order v. Michaux*, 279 U.S. 737, 744-45.

In *Ward v. Love County*, 253 U.S. 17, this Court held:

> ". . . it therefore is within our province to inquire not only whether [a federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.* With this qualification, it is true that a judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."
>
> *Id.*, 22-23. (Citations omitted, emphasis supplied.)

This Court is not bound to accept the California Supreme Court's self-serving characterization of its opinion as being premised upon an independent state ground: "[T]his Court may examine the opinion of the state court to ascertain whether a federal question was raised and decided, and whether the court rested its judgment on an adequate non-federal ground." *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 98-99.

It is arguable that the California Supreme Court could have precluded review of its decision by this Court by finding the death penalty only "cruel," concluding that such a finding was sufficient to render the death penalty unconstitutional under California's constitutional prohibition against "cruel *or* unusual punishments." However, as previously noted, the opinion expressly found the death penalty "both cruel and unusual"—the precise issue involved under the Eighth Amendment to the federal Constitution. Nowhere is it suggested by the California Supreme Court or by counsel for respondent that the concepts of "cruelty" and "unusualness' have different meanings under the federal and California constitutions. On the contrary, the California Supreme Court expressly held that the two constitutional provisions "serve[ ] an identical purpose" and are measured by the same standard.[18]

In view of the foregoing, it is appropriate to note:

> " 'The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no

[18]Appendix B, pp. 38, 50; *People v. Anderson, supra,* 6 Cal. 3d at 640, 648 [100 Cal. Rptr. at 160, 165, 493 P.2d at 888, 893].

application where, as here, the non-federal ground *might have been considered by the state court but was not.*' "

Internat. Steel Co. v. Surety Co., 297 U.S. 657, 666 (footnote omitted, emphasis supplied).

Cf. Jankovich v. Toll Road Comm'n, 379 U.S. 487, 491-92.

"[T]he Constitution measures a taking of [a right] not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (Stewart, J., concurring; emphasis in the original).

It is significant that when the California Supreme Court three years previously considered respondent's attack on the constitutionality of the death penalty, it made no distinction between the federal and California constitutional provisions prohibiting cruel and unusual punishment, employing the two provisions interchangeably even though both were at issue. *In re Anderson*, 69 Cal. 2d 613, 629-32 [73 Cal Rptr. 21, 32-34, 447 P.2d 117, 128-30] (1968).

With reference to the California Supreme Court's belated discovery of significance in California's 1849 choice of the conjunction "or" in its constitutional provision,

". . . To the extent that the decision . . . on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be

appropriate. For a State cannot be permitted [thereby] to defeat the constitutional prohibition . . . Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. . . ."

Hughes v. Washington, 389 U.S. 290, 296-97 (Stewart, J., concurring).

See also N.A.A.C.P. v. Alabama, 357 U.S. 449, 455-58.

For these reasons petitioner submits that this Court should disregard the California Supreme Court's effort to disguise its decision for the purpose of avoiding this Court's review, and that this Court should review the erroneous decision of the California Supreme Court invalidating the death penalty as "both cruel and unusual"—the precise issue arising under the Eighth Amendment and presently awaiting determination by this Honorable Court.

Opposing counsel in the present proceeding are also opposing counsel in the *Aikens* case and thus submitted the case at bar on their respective briefs in *Aikens*. For that reason, petitioner herein will not repeat at length its arguments relating to the Eighth Amendment but instead incorporates by reference the Respondent's Brief in *Aikens*. Petitioner's Petition for Rehearing, set forth as Appendix A, *infra*, focuses upon the particular errors in the California Supreme Court's opinion.

II

The California Supreme Court's Judicial Abolition of the Death Penalty so Usurps the Legislative Function as to Deny the People of the State of California Due Process of Law, Equal Protection of the Laws, and a Republican Form of Government

Refusing to "defer[] . . . to any other branch of government,"[19] and ignoring widespread public support for the death penalty and the California Legislature's repeated refusals to abolish the death penalty, the California Supreme Court has assumed the unorthodox role of a judicial Legislature. By abolishing the death penalty the court has enacted its personal views into law over the will of a protesting public. In the process, it is submitted, the people of the State of California have been deprived of their basic right to due process of law and equal protection of the laws under the Fourteenth Amendment to the federal Constitution as well as their right to a republican form of government guaranteed by Article IV, section 4 of the federal Constitution.

These constitutional guarantees encompass the fundamental right of the people to have their duly elected representatives empowered to enact and execute laws for the protection of our citizens' lives, liberty, and property.

The legislative apportionment cases lend strong support to petitioner's contention. *See Reynolds v. Sims*, 377 U.S. 533, 554-68; *Baker v. Carr*, 369 U.S. 186. As this Court held in *Reynolds:*

> ". . . The right to vote freely for the candidate of one's choice is of the essence of a democratic

[19] *See* n. 7, *infra.*

society, and any restrictions on that right strike at the heart of representative government. And the right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims, supra* at 555 (footnote omitted).

"[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . .

". . . Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. . . ." *Id.*, 565.

The existence of state constitutional provisions barring cruel and unusual punishment cannot serve as an "open ticket" for judges to undertake unreviewable participation in the legislative process. State courts, no less than state legislatures and state executive officers, are subject to the following restraint:

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. . . ."

Gomillion v. Lightfoot, 364 U.S. 339, 347.

What more basic right do the people of a State have, than to be able to provide through their elected representatives for the protection of society against danger-

ous criminals? This basic power to prescribe appropriate punishment for crime, exclusive of punishments involving unnecessary cruelty such as torture, as defined by this Court's decisions, lies at the heart of the police power reserved to the people of the States.

To immunize state courts from federal review so long as they restrict only *State* (and not the defendant) from exercising constitutionally protected rights, would make a one-way street of federalism and pervert the whole concept of the "independent state ground" as a bar to this Court's power of review.

To paraphrase the California Supreme Court, in a case in which it was concerned with alleged restrictions by the executive branch on its own judicial branch of government, such an approach would be " 'a step toward totalitarian concentration of power in the [judiciary]; a power to be exercised without any legislative standard and without possibility of [executive] review.' "[20] For under the California Supreme Court's expansive and fluid interpretation of the constitutional provision in question,

> ". . . it is difficult to see any limiting principle that would serve to prevent [that] Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law. . . ." *Powell v. Texas*, 392 U.S. 514, 533 (opinion of Marshall, J.).

Petitioner submits that the right of the people of the State of California to enact penal laws for their own protection can be vindicated only through this Court's

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[20] *People v. Tenorio*, 3 Cal. 3d 89, 93 [89 Cal. Rptr. 249, 251, 473 P.2d 993, 995] (1970).

review, since the California Supreme Court's usurpation of legislative power is otherwise unreviewable.

Conclusion

For the foregoing reasons petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court. In view of the circumstance that the present case and the *Aikens* case were argued by the same opposing counsel, submitted on the same briefs, and involve the same issue of cruel and unusual punishment, it is further submitted that summary disposition of the present matter in accordance with this Court's ultimate decision in *Aikens* might be appropriate.

Respectfully submitted,

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APPENDIX A.

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ROBERT PAGE ANDERSON,
Defendant and Appellant.

PETITION FOR REHEARING.

To the Honorable Donald R. Wright, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The People of the State of California hereby respectfully petition this Honorable Court for a rehearing in the above entitled case, the decision in which was filed on February 18, 1972.

A single crucial point is at issue in this case. It is not whether the death penalty is socially, philosophically, or politically desirable, but solely whether there is a specific provision in the Constitutions of the United States or California which precludes the people of the State of California from determining through their elected representatives that the protection of society requires the availability of the death penalty as a form of punishment for the most serious offenses.

This Court's decision precluding the people of this State from even considering whether they need the death penalty for the protection of innocent citizens, has deprived the people of their basic right to due process of law under the state and federal Constitutions—their right to have duly elected legislative representatives and executive officers empowered to enact and execute laws for the protection of our citizens' lives, liberty, and property.

Any citizen, even the most ardent foe of capital punishment, who believes that our form of government entrusts the enactment and repeal of legislation exclusively to legislative representatives elected by popular vote, who believes that the doctrine of separation of powers restricts the judicial as well as the executive and legislative branches of government, and who believes that we are a government of law and not of men, cannot help but be alarmed by this Court's opinion holding the death penalty unconstitutional as punishment both cruel and unusual.

Thus the present Petition, rather than reiterate the overall legal defense of capital punishment undertaken in Respondent's Briefs, will focus upon what are considered serious errors in judicial function and constitutional interpretation in the Court's written opinion.

1. This Court Should Not Have Decided the Issue Whether the Death Penalty Is Cruel and Unusual Punishment While That Issue Was Being Determined by the United States Supreme Court.

The errors in the Court's opinion and, as indicated below, the attendant failure of the Court to consider some of the basic ramifications wrought upon the law of California by its decision, may reflect apparent lack

of opportunity on the part of the Court to accord its customary, unhurried deliberation to the question pending before it.[1]

The Court's rush to judgment on the present issue appears judicially unorthodox when considered in the face of the United States Supreme Court's prior decision to hear the cruel and unusual punishment issue. This Court's unusual timing becomes even more apparent in view of the circumstance that the leading capital punishment case now before this nation's highest court is a California case.[2] In contrast to the customary deference of this and other state courts in postponing decision on an issue pending before the nation's highest tribunal, this Court set reargument only eleven days prior to the argument set before the United States Supreme Court. Despite this Court's pronouncement that "deferring to any other court" was unnecessary,[3] the Court's action has given the widespread impression of unseemly competitiveness in contrast to the comity normally prevalent between courts.

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[1]On December 6, 1971, the Court ordered reargument in the present case, argument having previously been had on February 4, 1970, appointed new counsel to represent appellant, and directed counsel on both sides to prepare to argue the issue of cruel and unusual punishment under the federal and California Constitutions. Argument was had on January 6, 1972, and an opinion was rendered on February 18, 1972. The expeditious resolution of the momentous issue involved in the present case contrasts vividly with the unhurried review which this Court normally accords even the average capital case. *See* pp. 8-10, *infra*.

[2]Certiorari was granted on the cruel and unusual punishment issue in *Aikens v. California* and three other cases on June 28, 1971, 403 U.S. 952, and all briefs of the parties in *Aikens* were filed by September 24, 1971. Oral argument was originally set for October 12, 1971, but was postponed until January 17, 1972, because of the two vacancies that occurred on the Court.

[3]Opinion, p. 14.

2. Despite Its Disclaimer, This Court Has Decided the Federal Eighth Amendment Issue of Cruel and Unusual Punishment.

In what appears to be an attempt to avoid United States Supreme Court review of its decision,[4] this Court has purported to base its opinion solely on the proscription against "cruel *or* unusual punishments" in the California Constitution[5] and to avoid resolution of the question whether the death penalty constitutes "cruel *and* unusual punishment" under the Eighth Amendment to the United States Constitution.[6]

However, this Court not only concedes that the federal and California constitutional provisions "serve[] an identical purpose" and are measured by the same standard[7] but expressly holds that "capital punishment is *both* cruel *and* unusual."[8]

3. There Is No Basis in Law for Having the People's Right to Enact the Death Penalty Hinge Upon the 1849 Constitutional Convention's Haphazard Choice of the Word "Or" Instead of "And".

When it concluded only three years ago that the death penalty was not cruel or unusual punishment, with all but one of the present justices on the Court and upon the claim of the same defendant, Robert Page Anderson, this Court quoted both the federal and the California constitutional provisions and employed the conjunctions "and" and "or" interchangeably in

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[4]*Cf. California v. Byers,* 402 U.S. 424, 427; *California v. Green,* 399 U.S. 149, 153.

[5]Art. I, § 6.

[6]Opinion, p. 2.

[7]Opinion, pp. 15, 29-30.

[8]Opinion, p. 2 (emphasis supplied).

rejecting the contention that the death penalty was cruel and unusual punishment.[9]

The late Justice Harlan wrote for the United States Supreme Court that it is a "proposition that the word 'or' is often used as a careless substitute for the word 'and' . . .,"[10] and a noted authority in the field of statutory construction has written that "[t]here has been . . . so great laxity in the use of these terms that courts have generally said that the words are interchangeable."[11]

Nineteen States employ the word "or" in their constitutional prohibitions against cruel and unusual punishment; twenty-two States employ "and," and six States bar only "cruel" punishment.[12] This variance in phraseology is probably as totally fortuitous as the initial composition of the Eighth Amendment.[13] Can it be seriously envisaged that among the original States, North Carolina's use of the word "or" precludes enforcement of the death penalty in that State whereas South Carolina's choice of "and" sanctifies capital punishment in that jurisdiction?

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[9]*In re Anderson,* 69 Cal. 2d 613, 629-32. Thus the following reference in this Court's opinion to the former *Anderson* case is inaccurate: ". . . we examined the issue on the basis of the conjunctive cruel *and* unusual punishment." (Opinion, pp. 23-24, emphasis by the Court.)

[10]*DeSylva v. Ballentine,* 351 U.S. 570, 573.

[11]Sutherland, 2 Statutes and Statutory Construction 451-52, §4923 (3d ed. 1943). *See also People v. Mattson,* 51 Cal. 2d 777, 791-92; *People v. Wright,* 131 Cal. App. 2d Supp. 853, 862; Agr. Code § 64012.

[12]*See* Respondent's Memorandum to the Court, dated January 5, 1972.

[13]*See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 Calif. L. Rev. 839, 840-41 (n.8) (1969).

Indeed the very constitutional history relied upon by this Court[14] demonstrates that the choice of conjunctions by the 1849 Constitutional Convention was haphazard, the proposed provision being changed without explanation from "and" to "or" one month subsequent to the Convention's rejection of a constitutional provision that would have expressly forbidden capital punishment.[15]

This Court finds significance in the totally ambivalent circumstance that the framers of the California Constitution had access to other state constitutions employing each of the two conjunctions.[16] However, nothing cited or advanced by the Court in any way indicates that "cruel or unusual punishment" means something different from "cruel and unusual punishment."

4. It Is at Best Self-Contradictory for This Court to Find the Death Penalty "Cruel" by Reason of the Length of Pre-Execution Confinement, Where This Condition Has Resulted Mainly From the Slow Pace of This Court's Review and This Court's Successive Reversals of Individual Cases.

In the face of the United States Supreme Court's conclusion that the death penalty is not cruel and unusual punishment,[17] and despite the California Constitution's express references to "capital offenses" and

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[14]Opinion, pp. 4-8.

[15]*See* Appellant's Supplemental Brief, pp. 5-8(n.12); Opinion, p. 17(n.22).

[16]Opinion, pp. 7-8.

[17]*Trop v. Dulles*, 356 U.S. 86, 99 (plurality opinion of Warren, C.J.); *Francis v. Resweber*, 329 U.S. 459, 463-64 (plurality opinion of Reed, J.); *In re Kemmler*, 136 U.S. 436, 447; *Wilkerson v. Utah*, 99 U.S. 130, 134-35.

offenses "punishable with death,"[18] this Court finds the death penalty to be "cruel."

The Court's opinion incorrectly states: "The People concede that capital punishment is cruel to the individual involved. They argue, however, that only 'unnecessary' cruelty is constitutionally proscribed."[19] Respondent at no time conceded that capital punishment is cruel in a constitutional sense. Asked by the court whether capital punishment did not involve the infliction of pain and whether for that reason it was not "cruel," respondent stated that in *that* abstract sense, *all* punishment was cruel; that in the view of some, life imprisonment was more cruel than death; and that capital punishment was probably less cruel than the death by natural causes that comes eventually to us all. What respondent endeavored to impress upon this Court was that numerous decisions of the United States Supreme Court hold it is only punishment which is "*unnecessarily* cruel" that is constitutionally forbidden,[20] and that "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[21]

When the present appellant, Robert Page Anderson, previously challenged the constitutionality of his death sentence, this Court three years ago found that the sentence was not cruel in any sense under either

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[18]*See* Opinion, p. 10(n.19).

[19]Opinion, p. 35.

[20]*Wilkerson v. Utah*, 99 U.S. 130, 136, quoted with approval in *Weems v. United States*, 217 U.S. 349, 370; *In re Kemmler*, 136 U.S. 436, 447. *See also Francis v. Resweber*, 329 U.S. 459, 463.

[21]*Francis v. Resweber, supra* at 464. *See also In re Kemmler, supra* at 47.

the federal or California Constitutions.[22] What has transpired in that interim to justify the Court's present ruling?

This Court premises its finding of "cruelty" upon the length of pre-execution confinement, a circumstance which did not impress this Court three years ago—even with respect to the eleven-year detention of Caryl Chessman.[23] The figures presently cited by the Court demonstrate that over half of the prisoners on death row were received there since 1970, and that none have been there longer than since 1964, when two were received.[24] Clearly the Court has advanced nothing which supports its decision to effectuate a wholesale release of the 107 prisoners currently on death row on the basis of length of pre-execution confinement.

But what is so particularly disturbing about the Court's reasoning is that the Court appears to be oblivious to the crucial circumstance of the Court itself being largely responsible for the length of pre-execution confinement.

The Court's process of review is, to say the least, an unhurried one with respect to capital cases—that is,

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[22]*In re Anderson*, 69 Cal. 2d 613, 629-32.

[23]"A further contention is made that the 'anguish of the 1,000 day wait on death row and the attendant deterioration of personality' renders the death penalty cruel and unusual. . . . A similar contention was rejected in People v. Chessman, 52 Cal. 2d 467, 498-499 . . . (cert. den. 361 U.S. 925 . . .). There the defendant was detained pending execution of sentence of death for more than 11 years during which period various matters of which he complained were litigated. He contended that such confinement constituted cruel and unusual punishment. We recognized that mental suffering undoubtedly attended his detention, indicated that there had not been unreasonable delay by California in the proceedings, and concluded that unconstitutionally cruel or unusual punishment had not been imposed." *In re Anderson*, 69 Cal. 2d 613, 632.

[24]Opinion, p. 33(n.37).

unhurried with the exception of the review accorded in the present appeal subsequent to the ordering of reargument.

By way of illustration, this Court's role in the formulation of pre-execution delay is set forth below with respect to the present appeal and two other automatic appeals. In each instance this Court kept the case under submission for two to three years after hearing oral argument:

Robert P. Anderson
(Crim. 13617)

July 2, 1969 — transcripts filed
Sept. 24, 1969 — Appellant's Opening Brief filed
Dec. 4, 1969 — Respondent's Brief filed
Feb. 4, 1970 — oral argument

Dec. 6, 1971 — ordered on calendar for reargument
Jan. 6, 1972 — oral reargument
Feb. 18, 1972 — decision filed

Robert E. Thornton
(Crim. 12099)

March 28, 1968 — transcripts filed
Jan. 29, 1969 — Appellant's Opening Brief filed
June 6, 1969 — Respondent's Brief filed
Oct. 9, 1969 — oral argument
Oct. 28, 1969 — Supplemental Respondent's Brief filed
Nov. 14, 1969 — Supplemental Appellant's Brief filed

at present—no decision yet filed

Willard A. Winhoven
(Crim. 10886)

Feb. 28, 1967 — transcripts filed
July 7, 1967 — Appellant's Opening Brief filed
Aug. 24, 1967 — Respondent's Brief filed
Nov. 28, 1967 — Appellant's Closing Brief filed
June 12, 1968 — oral argument
July 11, 1968 — Appellant's Supplemental Brief filed
July 30, 1968 — Respondent's Supplemental Brief filed

Sept. 24, 1971 — Defendant died—of heart disease, at age 60 (more than 11 years after the commission of his capital offense)

Not only has this Court's review of capital cases been slow, but frequently the initial automatic appeal has been only a small step on the long road to final judgment from this Court. For example, the course of David Seiterle's case (involving a double murder) through the official reports of this Court illustrates a primary cause of pre-execution delay: this Court heard his case six times between 1961 and 1969, preparing formal opinions in each instance.[25] He is currently awaiting retrial. Another illustration is the case of Doyle Terry, who after numerous reviews and reversals by this Court between 1962 and 1971 is awaiting his fifth trial in Los Angeles Superior Court for the murder of a police officer.[26]

The overall picture is not any brighter. Excluding the present case, this Court has reversed forty-one of the sixty death penalty appeals (68%) it has heard since September 1, 1967, and has set aside the death penalty or the entire judgment in all fifteen of the capital cases in which it has issued orders to show cause during the period in question.[27]

In view of the direct responsibility which this Court bears for the length of pre-execution confinement in California, respondent can react only with astonishment to the Court's postulation of its novel constitu-

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[25]*People v. Steiterle*, 56 Cal. 2d 320; *Seiterle v. Superior Court*, 57 Cal. 2d 397; *People v. Seiterle*, 59 Cal. 2d 703, *cert. denied*, 375 U.S. 887; *In re Seiterle*, 61 Cal. 2d 651, *cert. denied*, 379 U.S. 992; *People v. Seiterle*, 65 Cal. 2d 333, *cert. denied*, 387 U.S. 912; *In re Seiterle*, 71 Cal. 2d 698.

[26]*People v. Terry*, 57 Cal. 2d 538, *cert. denied*, 375 U.S. 960; *People v. Terry*, 61 Cal. 2d 137, *cert. denied*, 379 U.S. 866; *People v. Terry*, 70 Cal. 2d 410, *cert. denied*, 399 U.S. 811; *In re Terry*, 4 Cal. 3d 911.

[27]*See* Respondent's Brief in the *Aikens* case (lodged with this Court), Table H, Appendix, p. 1.

tional doctrine of "cruelty" upon such a frail and self-constructed foundation.

Accepting for the purpose of argument the Court's explanation that delays in the execution of sentence render the death penalty unconstitutional as "cruel" punishment, can it be assumed that had this Court not permitted and caused excessive delay, the death penalty would therefore be constitutional? If so, then it is not society's "evolving standards of decency" that transform capital punishment from constitutional to unconstitutional; it is the procrastination which this Court has built into our system of criminal justice.

5. This Court's Action in Finding the Death Penalty "Unusual" by Reason of the Judicially-Arrested Rate of Executions, While Ignoring the Steady Rate of Jury Death Verdicts and Other Indicators of Society's Acceptance of the Death Penalty, Demonstrates That the Court Has Based Its Decision on the Court's Own "Evolving Standards" Rather Than on Society's Standards.

Respondent can only speculate as to what has occurred to justify this Court's present characterization of the death penalty as unconstitutionally "unusual," when only three years ago the Court rejected the identical claim by Anderson and his present counsel.[28]

Respondent disputes the relevance of the Court's adopted "test of widespread acceptance among civilized peoples" as well as the Court's measurement of California's constitutional provisions by reference to nations including the Dominican Republic, Greenland, Liechtenstein, Mozambique, Nepal, and Surinam,[29]

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[28] *In re Anderson*, 69 Cal. 2d 613, 629-32.

[29] Opinion, pp. 40, 44.

while ignoring the retention of the death penalty by forty-one of our States. Moreover, the Court's postulation of a "repudiation of the death penalty in this country" and a "world-wide trend towards abolition"[30] is suspect because, in the three years since this Court considered the question in Anderson's previous attack on the death penalty, not a single American jurisdiction has joined the nine States which have abolished capital punishment,[31] and only the Vatican State and one of the Mexican states have abolished the death penalty. Significantly, before the present case abolition had never occurred by *judicial* decree.

In the following statements, this Court makes it unmistakably clear that it is measuring the concept of cruel and unusual punishment by reference to the Court's own "evolving standards" rather than by society's standards:

> ". . . *Public acceptance of capital punishment is a* relevant but *not controlling factor* in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants. Nor [by] public opinion polls. . . ."
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> ". . . The steady decrease in the number of executions . . . persuasively demonstrates that capital punishment is unacceptable to society today."

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[30]Opinion, pp. 41-42.

[31]Only last month, the Senate of West Virginia, one of these nine States, voted to restore that punishment. Los Angeles Times, Part I, p. 7 (Feb. 12, 1972).

> "We have already noted that the death sentence is rarely imposed in California today and that it is even more rarely carried out. . . ."[32]

It is incomprehensible to respondent how the judicially-arrested rate of executions,[33] reflecting the actions of appointed judges, can be considered a more accurate barometer of society's evolving standards than the public's widespread support for the death penalty as reflected in polls, referendums, legislation enacted or retained by elected legislative representatives, and jury verdicts imposing the death sentence. (Since November of 1968, when this Court rejected the "cruel and unusual" and "cruel or unusual" punishment argument made by this very same defendant, California juries have sent into California's prison system 70 of the 107 prisoners now on death row: 13 in 1969, 34 in 1970, 20 in 1971, and 3 in the first two months of 1972.)

Would this Court find the death penalty unobjectionable under the constitution if the sentences imposed by juries on the murderers presently on death row had not been stayed by the courts since 1967? If so, then had the courts not intervened and had the decisions of those juries been honored, the death penalty would not be "unusual" and would therefore be constitutional.

If society's "evolving standards" were to regress, would this Court's fluid view of the constitution sanctify punishments considered barbaric by today's standards?

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[32]Opinion, pp. 30-31 (emphasis supplied), 32, 40. Respondent's Brief in the *Aikens* case (lodged with this Court) demonstrates conclusively (at pp. 103-14) that the death penalty is carried out in California without any racial, social, or economic discrimination.

[33]*See People v. Goodridge*, 70 Cal. 2d 824, 839.

The Court does not even attempt to document its incorrect and conclusionary statement that capital punishment "is now almost wholly repudiated by those familiar with its processes."[34] One can only conclude that the Court considers itself as comprising those most familiar with the death penalty; that the Court finds the death penalty inconsistent with its own "evolving standards," and that capital punishment has therefore been judicially "repudiated" in California. Recognition of the foregoing provides the only satisfactory answer to the question of *whose* standards have evolved since Aaron Mitchell's judgment of death was affirmed by a unanimous California Supreme Court in 1966[35] and carried out in the following year.

6. This Court Has Made an Inappropriate and Unsubstantiated Legislative Finding That Deterrence and Isolation of Dangerous Criminals, as Well as Retribution, Do Not "Justify so Onerous a Penalty as Death".[36]

Three years ago on the occasion of Anderson's previous attack on the constitutionality of the death penalty, this Court held:

> "[T]he fixing of penalties for a crime is a legislative function, and we will not nullify the legislative judgment as to the appropriate penalties for the heinous crime of first degree murder. It is for the Legislature and not this court to decide whether it is sound public policy to empower the imposing of the death penalty."

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[34]Opinion, p. 35.

[35]*People v. Mitchell*, 63 Cal. 2d 805.

[36]Opinion, p. 36.

> "There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional."[37]

Now this Court states that "respondent has not demonstrated that the death penalty can be justified as necessary to any state interest."[38] Such an approach to a prescribed punishment, or to a legislative enactment in any field, violates the fundamental principle that statutes are presumed to be valid, that courts will not reweigh legislative policies and factual determinations, and that the burden is upon the person *attacking* the validity of a statute to demonstrate that no conceivable, rational basis exists for the statute in question.

Moreover, the Court offers nothing to refute the widely-held view among the public that imposition of the death penalty protects innocent members of society in ways that life imprisonment cannot, by deterring certain types of murders and by incapacitating dangerous criminals. Furthermore, it is not for this Court to decree that retribution is not a permissible consideration of punishment.

(a) Deterrence.

This Court chooses to ignore the dozens of documented instances called to its attention in which the death penalty has been shown indisputably to have saved the life of a victim. (The Court also ignores the opportunity to decide the present issue upon the evidence received in *People v. Thornton,* Crim. 12099, relative to the constitutionality of the death penalty.

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[37] *In re Anderson,* 69 Cal. 2d 613, 628, 632 (citations omitted.)

[38] Opinion, p. 36; *see also id.,* 40.

the Court choosing instead to base its ruling on its own conjecture on these matters.) Every criminal court trial judge, prosecutor, and police officer knows personally of cases in which an armed robber has employed an unloaded or inoperable firearm, or has refrained from firing an operable weapon, for the express purpose of avoiding killing his victim and thereby risking receiving the death penalty.[39]

Former Justice Schauer of this Court recognized:

> "That the ever present potentiality in California of the death penalty, for murder in the commission of armed robbery, each year saves the lives of scores, if not hundreds of victims of such crimes, cannot I think, reasonably be doubted by any judge who has had substantial experience at the trial court level with the handling of such persons. . . ."[40]

If this Court's decision is to stand, gunmen facing a maximum term of life imprisonment for armed robbery may conclude that they might as well kill their victims or pursuing police officers, because the robbers would thereby immeasurably increase their chances of avoiding apprehension and conviction at no risk of substantially increased punishment.[41]

What constitutes an adequate deterrent to justify the death penalty in the eyes of this Court? Can any-

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[39]*See People v. Love*, 56 Cal. 2d 720, 734-37, 744 (dissenting opinions of McComb, J., and Schauer, J.); Respondent's Brief in the *Aikens* case (lodged with this Court), pp. 81-89. *See also* Royal Commission on Capital Punishment 1949-1953 Report 335-39 (1953).

[40]*People v. Love*, 56 Cal. 2d 720, 744 (dissenting opinion) (footnotes omitted).

[41]*Id.*, 746 (Schauer, J., dissenting).

one doubt that there are at least some persons who are deterred by the death penalty—how many lives of innocent citizens must be shown to be saved to justify the execution of those whom juries send to prison under sentence of death? How many innocent citizens would be alive today but for those murderers? If, as this Court says, society is diminished to an extent by carrying out the judgment of the juries who have sent these 107 vicious criminals to death row, is society not replenished by saving the life of even one innocent citizen?

(b) Incapacitation.

This Court again ignores all practical realities in concluding, "in no sense can capital punishment be justified as 'necessary' to isolate the offender from society."[42] That myth evaporates upon a perusal of this Court's reported decisions, which are replete with instances of life-termers' killing guards, civilian prison employees, or fellow prisoners; and of murderers' being paroled, or escaping from prison, only to kill again.[43] Numerous other episodes of this type, elsewhere documented, have been called to the attention of this Court, most notably attempted escapes from death row at San Quentin Prison, the Marin County Courthouse shootout which resulted in the death of a superior court judge, and the recent riots and attempted escapes from

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[42]Opinion, p. 37.

[43]*See, e.g., People v. Robles,* 2 Cal. 3d 205, 213; *People v. St. Martin,* 1 Cal. 3d 524, 529; *People v. Vaughn,* 71 Cal. 2d 406, 412; *People v. Gilbert,* 63 Cal. 2d 690, 702; *In re Cathey,* 55 Cal. 2d 679, 685; *People v. Purvis,* 52 Cal. 2d 871, 875; *People v. Jensen,* 43 Cal. 2d 572, 578; *People v. Peete,* 28 Cal. 2d 306, 308-09; *People v. Hall,* 199 Cal. 451, 458-59.

San Quentin Prison and Attica State Prison in New York.[44]

This Court has intimate knowledge of the inadequacies of life imprisonment. Upon this Court's reversal of the judgment of death of Joseph Morse for double murder, the defendant's punishment was fixed at life imprisonment, and while awaiting sentencing he garrotted a fellow prisoner at the county jail because the prisoner owed him some cigarettes. (For the latter offense the defendant was sentenced to death, only to have that judgment as well as the judgment on the other murders reversed by this Court.)[45]

Who can guarantee that defendants like Charles Manson, John Linley Frazier, and Sirhan Sirhan will never escape or be paroled? James Earl Ray, under 99-year sentence for the murder of Rev. Martin Luther King, Jr., has so far made three attempts at escape,[46] and Lucille Miller[47] was recently granted parole, her release being set for May, 1972, after serving the bare seven-year minimum of her life term.[48]

(c) Retribution.

Retribution is still a permissible consideration of punishment, even though it is "no longer the dominant objective."[49] Lord Justice Denning testified before the British Royal Commission on Capital Punishment:

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[44]*See* Respondent's Brief in the *Aikens* case (lodged with this Court), pp. 96-98. One escapee from Florida's death row remained at large for two years until recently apprehended. Los Angeles Times, Part I, p. 3 (Dec. 23, 1971).

[45]*People v. Morse*, 60 Cal. 2d 631; *In re Morse*, 70 Cal. 2d 702; *People v. Morse*, 70 Cal. 2d 711.

[46]Los Angeles Daily Journal, p. 7 (Feb. 21, 1972).

[47]*See People v. Miller*, 245 Cal. App. 2d 112.

[48]Pen. Code § 3046. *See* Los Angeles Times, Part I, p. 1 (Feb. 4, 1972).

[49]*Williams v. New York*, 337 U.S. 241, 248.

"The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunciation of all, namely the death penalty."[50]

7. The Court's Abolition of the Death Penalty Is One More in a Wave of Recent Decisions From This Court Violating California's Constitutional Separation of Powers and Premised Upon a Theory of Judicial Supremacy Over Our Democratic Institutions of Government.

The momentous impact of the Court's decision invalidating California's statutes prescribing the death penalty for the most serious offenses extends even beyond the effect that decision will have upon the lives of innocent victims of crime and the lives of custodial and police officers. For this decision is one more important link in a chain of decisions which are fast establishing unreviewable power in this Court over matters traditionally considered to lie within the realm of our democratically elected legislative and executive branches.

Recent rulings of this Court have, in the name of separation of powers, stripped prosecutors of the right to withhold consent to the striking of alleged prior offenses and to the charging of certain offenses as misdemeanors. These rulings, while premised upon the

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[50]National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359(n.47) (1970).

need for removing restrictions on judicial power,[51] could to paraphrase the Court, be characterized as "'a step toward totalitarian concentration of power in the [judiciary]; a power to be exercised without any legislative standard and without possibility of [executive] review.'"[52] Similarly, this Court has recently reinterpreted penal statutory provisions in a light contrary to obvious legislative intent, in essence rewriting the codes to effectuate its own judicial intent at the expense of the executive branch of government.[53]

This Court pointedly refuses to "defer[] . . . to any other branch of government"[54] but appears oblivious to the nature of constitutional separation of powers as a three-way matter rather than a convenient device designed exclusively to redress alleged restrictions on the judiciary's own branch of government.

This derogation of our democratically-based branches of government has extended to other areas, outside the criminal law, which have always been intended to remain under direct popular control. Thus recent years have seen this Court declare portions of the California Constitution invalid under the federal Constitution, including the provision requiring two-thirds voter approval for local general obligation bond proposals.[55] Similarly this Court has recently held California's public school financing system subject to invalidation under the federal Constitution.[56]

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[51]*Esteybar v. Municipal Court*, 5 Cal. 3d 119; *People v. Tenorio*, 3 Cal. 3d 89.

[52]*People v. Tenorio*, *supra* at 83.

[53]*See People v. Beagle*, 6 Cal. 3d 441; *People v. Daniels*, 71 Cal. 2d 1119.

[54]Opinion, p. 14.

[55]*Westbrook v. Mihaly*, 2 Cal. 3d 765.

[56]*Serrano v. Priest*, 5 Cal. 3d 584.

In this framework, the Court's expansive view of the cruel and unusual punishment clause is particularly ominous, since the vague confines of that provision can be read by an unrestrained judiciary as a green light for judicial legislation, an open ticket for judges to write their personal views into the constitution and to invalidate virtually *any* punishment as cruel and unusual. In the wake of the present ruling the temptation will be great for this Court and other courts to follow the course of " 'enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled.' "[57]

Will this or some other state court proceed to declare life imprisonment, without possibility of parole or under an indeterminate sentence, to be cruel and unusual—perhaps because the Legislature has (unwisely, in the Court's view) repeatedly rejected the opportunity to repeal that punishment? Is respondent soon to be saddled with the burden of having to justify various forms of non-capital punishment by establishing that life imprisonment without possibility of parole more effectively serves judicially-approved aims of punishment than does life with possibility of parole, that life is more effective than a fixed or indeterminate term of imprisonment, imprisonment more effective than county jail, county jail more effective than probation, and probation more effective than a fine? Is life without possibility of parole for kidnaping now disproportionate to the court-imposed maximum of straight life for murder where the kidnaping is not particularly aggravated? Similar problems of proportionality will no doubt be raised with respect to the maximum terms of life for

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[57] *In re Anderson*, 69 Cal. 2d 613, 635 (Mosk, J., concurring).

robbery and burglary and with respect to sexual and narcotic offender commitment and adjudication of habitual criminality.

Some court may not consider these to be idle hypotheses. Under this Court's expansive and fluid interpretation of the constitutional provision in question,

> ". . . it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law. . . ."[58]

Finally, certain practical problems caused by the Court's decision bear mention. The judicial method of statutory repeal being ungainly as it is, this Court's invalidation of the statutes prescribing the death penalty has had certain ramifications upon the law of California which were not considered by the Court's opinion. Most of these deficiencies could have been remedied had the repeal of the death penalty been by the Legislature.

(a) At present Angela Davis has secured her release on bail because California's Constitution permits bail except in certain capital cases, and other persons charged with murder (including Juan Corona, accused of slaying twenty-five farm workers in Yuba City) have filed applications demanding their release from custody prior to trial.[59]

(b) This Court has reduced appellant's sentence to life imprisonment and has provided for the same re-

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[58] *Powell v. Texas*, 392 U.S. 514, 533 (plurality opinion of Marshall, J.)

[59] Los Angeles Times, Part I, pp. 1, 23 (Feb. 25, 1972).

duction with respect to the sentences of all defendants whose judgments of death are final.[60] The Legislature might well have decided instead to substitute life imprisonment without possibility of parole. The Court's action is also an inappropriate exercise of the Governor's power of commutation, as the Governor might similarly have wished to reduce the terms of such prisoners to life without possibility of parole rather than have the terms fixed at straight life. At the same time the Court makes no provision for reducing the sentences of the persons whose judgments of death are not final. Although the Court apparently felt that this matter could be left to the courts reviewing the individual appeals, the Department of Corrections appears to be precluded from transferring any such prisoner from San Quentin to another institution until the individual judgments of death are formally reduced, since the law requires that men under sentence of death be confined at San Quentin.[61] Furthermore, the Court has inexplicably authorized reduction of the sentence of aggravated kidnapers from death to straight life, even though the latter punishment is unauthorized by law, the alternate punishment being life without possibility of parole.[62]

(c) Statutory law provides a mandatory penalty of death for the killing of a non-inmate by a prisoner serving a life sentence.[63] If no valid penalty is now provided, is killing a guard punishable by only a maximum of five years in prison under the catchall provision[64]

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[60]Opinion, p. 47(n.45).
[61]Pen. Code § 1202a.
[62]Pen. Code § 209.
[63]Pen. Code § 4500.
[64]Pen. Code §18.

prescribing that punishment where no other punishment is provided? The same problem is presented with respect to the offenses of treason and perjury in capital cases which results in the execution of an innocent person.[65]

(d) Can defendants who received a sentence of either death or life imprisonment for murder now claim successfully that the jury that tried them was unfairly constituted by reason of the exclusion of persons unalterably opposed to the death penalty?

(e) Do the relatives of a person executed by the State have a cause of action against the State—or has the "evolution" in our standards occurred since the last execution, in 1967, so that what is held unconstitutional today was not unconstitutional then?

Conclusion.

Obvious though it should be, the single issue at bar bears reiteration: it is not whether this Court deems the death penalty socially, philosophically, or politically desirable, but solely whether the cruel and unusual punishment clauses in the United States and California Constitutions, adopted at a time when the death penalty was in common use, preclude the people of the State of California from determining through their elected representatives that the protection of society presently requires the death penalty as one of the sanctions available for the punishment of the most serious offenses.

Three years ago a member of this Court, noting his "personal belief in the social invalidity of the death

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[65]Pen. Code §§ 37, 128.

penalty," stated with reference to Anderson's attack on the constitutionality of that form of punishment:

> ". . . I am tempted by the invitation of petitioners to join in judicially terminating this anachonistic penalty. However, to yield to my predilections would be to act wilfully 'in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled. . . .' (Frankfurter, The Supreme Court in the Mirror of the Justices (1957) 105 U.Pa.L.Rev. 781, 794.)
>
> "As a judge, I am bound to the law as I find it to be and not as I might fervently wish it to be. I conclude that Justice Burke has properly stated the current law of California and of every other American jurisdiction that has considered the problem."[66]

Nothing advanced by the Court suggests any basis for rejecting such an objective approach, nor any basis for the turnabout in this Court's position that has taken place only three years after the Court's rejection of identical challenges to the death penalty by Anderson and his same counsel. One can only surmise that this Court has seen fit to impose its own evolution of standards upon a protesting public.

The Court's lack of respect for the constitutional doctrine of separation of powers and for the Court's own precedents can only be viewed by the public as indicative of a lack of judicial restraint and responsibility, thereby decreasing the already-declining respect of the public for our courts.

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[66] *In re Anderson*, 69 Cal. 2d 613, 634-35 (Mosk, *J.*, concurring).

This Court states that its decision "is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members."[67] But a society that desires to respect human life must protect the life of its citizens.

For the foregoing reasons respondent requests that a rehearing be granted and that the judgment imposing the death sentence be affirmed in its entirety.

Respectfully submitted,

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[67]Opinion, pp. 45-46.

APPENDIX B.

Opinion of the Supreme Court of California

[Crim. No. 13617. In Bank. Feb. 18, 1972.]

THE PEOPLE, Plaintiff and Respondent, v.
ROBERT PAGE ANDERSON, Defendant and Appellant.

COUNSEL

Neri Ramos and Jerome B. Falk, Jr., under appointments by the Supreme Court, and Anthony G. Amsterdam for Defendant and Appellant.

Ernest L. Graves, Renzi & Kilbride, Fred T. Kilbride, Gerald N. Gottlieb and Earl Klein as Amici Curiae on behalf of Defendant and Appellant.

Thomas C. Lynch and Evelle J. Younger, Attorneys General, William E. James, Assistant Attorney General, Thomas Kallay and Ronald M. George, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

WRIGHT, C. J.—A jury found Robert Page Anderson guilty of first degree murder, the attempted murder of three men, and first degree robbery, and fixed the penalty at death for the murder. The judgment was affirmed. (*People v. Anderson* (1966) 64 Cal.2d 633 [51 Cal.Rptr. 238, 414 P.2d 366].) Thereafter the remittitur was recalled and the judgment was reversed insofar as it related to the death penalty under the compulsion of *Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]. (*In re Anderson* (1968) 69 Cal.2d 613 [73 Cal.Rptr. 21, 447 P.2d 117].)

A second trial was had on the issue of the penalty for the murder, and the jury again imposed the death penalty. A motion for a new trial was denied, and this appeal is now before us automatically under subdivision (b) of Penal Code section 1239.

Defendant contends that error was committed in selecting the jury, that certain evidence was improperly admitted, that the prosecutor was guilty of prejudicial misconduct, and that the death penalty constitutes both cruel and unusual punishment and, as such, contravenes the Eighth Amendment to the United States Constitution and article I, section 6, of the Constitution of California. We have concluded that capital punishment is both cruel and unusual as those terms are defined under article I, section 6, of the California Constitution, and that therefore death may not be exacted as punishment for crime in this state. Because we have determined that the California Constitution does not permit the continued application of capital punishment, we need not consider whether capital punishment may also be proscribed by the Eighth Amendment to the United States Constitution.[1]

The California Constitution

Before undertaking to examine the constitutionality of capital punishment in light of contemporary standards, it is instructive to note that article I, section 6, of the California Constitution,[2] unlike the Eighth Amendment to the United States Constitution,[3] pro-

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[1]We note that this issue is presently before the United States Supreme Court. (*Aikens v. California,* No. 68-5027; *Furman v. Georgia,* No. 69-5003; *Jackson v. Georgia,* No. 69-5030.)

[2]Article I, section 6: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; *nor shall cruel or unusual punishments be inflicted.* Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned." (Italics added.)

[3]United States Constitution, Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (Italics added.)

hibits the infliction of cruel *or* unusual punishments. Thus, the California Constitution prohibits imposition of the death penalty if, judged by contemporary standards, it is either cruel or has become an unusual punishment.

Some commentators have suggested that the reach of the Eighth Amendment and that of article I, section 6, are coextensive, and that the use of the disjunctive form in the latter is insignificant.[4] Our review of the history of the California provision persuades us, however, that the delegates to the Constitutional Convention of 1849, who first adopted the section which was later incorporated into the Constitution of 1879, were aware of the significance of the disjunctive form and that its use was purposeful.

The California prohibition of cruel or unusual punishment first appeared as part of the "Declaration of Rights" proposed by the Select Committee of the Constitutional Convention as article I of the Constitution to be drafted by the House of Delegates. When proposed on September 7, 1849, section V of article I declared: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel *and* unusual punishments be inflicted, nor shall witnesses be unreasonably detained."[5] (Italics added.) But for the addition of the "witness" clause, the proposed section was identical to the Eighth Amendment to the United States Constitution. The delegates were advised when the Declaration of Rights was first proposed that the

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[4]Comment, *The Death Penalty Cases* (1968) 56 Cal.L.Rev. 1268, 1326, footnote 502. But see, Mosk, *The Eighth Amendment Rediscovered* (1968) 1 Loyola L.A.L. Rev. 4, 17-18.

[5]Browne, Debates in the Convention of California (1850) page 30 (hereinafter "1849 Debates").

first eight sections had been taken from the Constitution of New York and that all others were from the Constitution of Iowa.[6] On September 8, 1849, the convention resolved into a committee of the whole and adopted the fifth section without debate. Nor was there any debate on the section during the following month. On October 10, 1849, however, when the House of Delegates adopted the section it specified that cruel *or* unusual punishments were prohibited. The reporter of the debates stated only that "Article I of the constitution on the 'Declaration of Rights,' was taken up, read the third time, a few verbal errors corrected, and then passed."[7]

Article I, section 5, of the 1846 Constitution of New York, the first New York Constitution to include such a prohibition, proscribed cruel *and* unusual punishments.[8] The 1846 Iowa Constitution, after which many of the sections of the proposed Declaration of Rights were patterned, also proscribed cruel *and* unusual punishments.[9] Thus, it is apparent that the delegates did not make the change in order to correct a "verbal error" in transcribing the provision from the New York original, nor was it an attempt to conform it to the Iowa Constitution.

Although the delegates to the convention were limited in their access to models upon which to base the proposed California Constitution at the commencement of their deliberations,[10] by the end of the convention

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[6] *Id.* page 31.

[7] *Id.* page 458.

[8] 5 Thorpe, American Charters, Constitutions, and Organic Laws (1909) page 2654 (hereinafter "Thorpe").

[9] 2 Thorpe, page 1125.

[10] W. M. Gwin, formerly a congressman from Mississippi, who reputedly came to California in order to become a senator

they had access to the constitutions of every state.[11] At least 20 state constitutions were mentioned by delegates during the debates.[12] The majority of those which included declaration of rights or equivalent provisions differed from the New York, Iowa, and United States Constitutions and did not proscribe cruel *and* unusual punishments. Rather, they prohibit "cruel punishments,"[13] or "cruel or unusual punishments."[14] Several had provisions requiring that punishment be proportioned to the offense[15] and some had dual provisions prohibiting cruel and/or unusual punishments and disproportionate punishments.[16]

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from the new state, was named a delegate to the convention and arrived prepared with copies of the Iowa Constitution which he distributed among the delegates. (Browne, 1849 Debates, p. 24.)

[11]*Id.* page 221.

[12]*Id.* pages 37, 56, 69, 110, 380, 384.

[13]E.g., Pennsylvania Constitution of 1838, article IX, section 13 (5 Thorpe, p. 3114); Alabama Constitution of 1819, article 1, section 16 (1 Thorpe, p. 98); Delaware Constitution of 1831, article 1, section 11 (1 Thorpe, p. 583); Kentucky Constitution of 1799, article X, section 15 (3 Thorpe, p. 1290); Mississippi Constitution of 1832, article I, section 16 (4 Thorpe, p. 2050); Rhode Island Constitution of 1842, article I, section 8 (6 Thorpe, p. 3223); South Carolina Constitution of 1790, article IX, section 4 (6 Thorpe, p. 3264).

[14]E.g., North Carolina Constitution of 1776, paragraph X (5 Thorpe, p. 2788); Florida Constitution of 1838, article I, section 12 (2 Thorpe, p. 665); Massachusetts Constitution of 1780, article XXVII of Declaration of Rights (3 Thorpe, p. 1892); New Hampshire Constitution of 1792, Part First, article XXIII (4 Thorpe, p. 2474).

[15]E.g., Arkansas Constitution of 1836, article II, section 13: "That all penalties shall be reasonable and proportioned to the nature of the offense." (1 Thorpe, p. 270); Illinois Constitution of 1848, article XIII, section 14: "All penalties shall be proportioned to the nature of the offense; the true design of all punishment being to reform, not to exterminate mankind." (2 Thorpe, p. 1008); New Hampshire Constitution of 1792, Part First, article XVIII (4 Thorpe, p. 2473).

[16]E.g., Indiana Constitution of 1816, article I, section 15 (cruel and unusual punishment) and section 16 ("All penalties

(This footnote is continued on next page)

The fact that the majority of constitutional models to which the delegates had access prohibited cruel or unusual punishment, and that many of these models reflected a concern on the part of their drafters not only that cruel punishments be prohibited, but that disproportionate and unusual punishments also be independently proscribed, persuades us that the delegates modified the California provision before adoption to substitute the disjunctive "or" for the conjunctive "and" in order to establish their intent that both cruel punishments and unusual punishments[17] be outlawed

shall be proportioned to the nature of the offense") (2 Thorpe, p. 1059); Maine Constitution of 1819, article I, section 9 ("shall be proportioned to the offense . . . nor cruel nor unusual punishments inflicted") (3 Thorpe, pp. 1647-1648); Rhode Island Constitution of 1842, article I, section 8 ("nor cruel punishments inflicted" and "all punishments ought to be proportioned to the offense") (6 Thorpe, p. 3223).

[17]The delegates to the constitutional convention of 1849 had reason to be concerned with outlawing punishments which, although apparently accepted as necessary and not unduly cruel, were unusual. The absence of any effective government at the time of the discovery of gold and consequent proliferation of mining camps, had resulted in the administration of justice, such as it was, in the camps by vigilante committees. (3 Hittell, History of California (1898) p. 272 and *passim* [hereinafter Hittell].) Lacking means other than direct administration of physical punishment by which to enforce their judgments, the miners developed a variety of punishments which can only be described as "unusual" even in that day. Hittell described the punishment imposed upon a thief who had been sentenced to be hanged, but whose punishment was modified when death was thought to be too severe. "[U]pon the suggestion of a milder punishment, it was determined that the culprit should receive a hundred lashes on his bare back and have his ears cut off and his head shaved so that he might everywhere be recognized in the mining districts as a felon." (*Id.* p. 273.) Public flogging followed by banishment from the district was a common punishment. Even under the Mexican Governors, unusual punishments had been devised to deter lawlessness. In 1824 Governor Arguello, having determined that the "usual punishments" had been ineffective, decreed that theft of property valued at over 200 reals, burglary, and housebreaking were

in this state.[18] In reaching this conclusion we are mindful also of the well established rules governing judicial construction of constitutional provisions. We may not presume, as respondent would have us do, that the framers of the California Constitution chose the disjunctive form "haphazardly," nor may we assume that they intended that it be accorded any but its ordinary meaning. (*Los Angeles Met. Transit Authority* v.

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to be punished by death and that if murder had occurred during the commission of those offenses, the body should be quartered. Theft of property worth from 10 to 50 reals was to be punished by condemning the perpetrator to 10 years at public labor. Between 50 and 200 reals, the 10 years' labor was to be accompanied by "six public floggings or run the gauntlet of two hundred men armed with heavy switches six times" (2 Hittell, p. 79).

[18]We find no indication in the Debates and Proceedings of the Constitutional Convention of 1878-1879 that the delegates to that convention intended any change in the meaning of the section. To the contrary, it appears from one debate on the question of amending the section to expressly provide that whipping was not cruel or unusual punishment, that the delegates were concerned that cruel punishments such as whipping not be reintroduced irrespective of whether whipping had existed at common law, had been reinstituted in England, and still survived in other states. The delegates were concerned with its cruel nature and not with the question of whether it was an "unusual" punishment. (Willis and Stockton, Debates and Proceedings (1880) pp. 244-245 [hereinafter "1879 Debates]".)

One delegate, noting that whipping was permitted in Delaware, and possibly in Kentucky and Virginia, suggested that their constitutions were substantially similar, and if the reason it was permitted there but had been declared unconstitutional by one California appellate court was that California's Constitution included the word "unusual," "then it is a sufficient answer to say that if it is to become fashionable, let it become fashionable elsewhere first, and the objection that it is unusual will cease to apply to our Courts." (1879 Debates, p. 246.) At the time the Kentucky and Delaware Constitutions prohibited only "cruel" punishments, although the Virginia Constitution prohibited "cruel and unusual" punishments. It is apparent that the delegates recognized the distinctions between the constitutions and considered the terms of the California Constitution to be disjunctive.

Public Util. Com. (1963) 59 Cal.2d 863, 869 [31 Cal.Rptr. 463, 382 P.2d 583]; *Lockhart v. Wolden* (1941) 17 Cal.2d 628, 631 [111 P.2d 319].)

The same rules of construction require that wherever possible we construe constitutional provisions in such a way as to reconcile potential conflict among provisions and give effect to each. (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637 [268 P.2d 723].) It has been suggested that we are therefore restrained from considering whether capital punishment is proscribed by article I, section 6, since the death penalty is expressly or impliedly recognized in several other provisions of the California Constitution.[19] We perceive no possible conflict or repugnance between those provisions and the cruel or unusual punishment clause of article I, section 6, however, for none of the incidental references to the death penalty purport to give its existence constitutional stature. They do no more than recognize its existence at the time of their adoption. Thus, the bail clause of article I, section 6, restricts the right to bail in capital cases; the due process clause of article I, section 13, ensures that life will not be taken without due process; and section 8 of article I allows felony defendants represented by

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[19]Article I, section 6: "All persons shall be bailable by sufficient sureties, unless for capital offenses ... ."; article I, section 8: ". . . If the felony charged is not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein [and] the defendant may . . . plead guilty to the offense . . ."; article I, section 13: ". . . No person shall . . . be deprived of life . . . without due process of law; . . ."; article V, section 8: ". . . the Governor, on conditions he deems proper, may grant a reprieve. . . ."; article VI, section 11: "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced."

counsel to plead guilty at an arraignment before a magistrate only in noncapital cases. Similarly, section 8 of article V gives the Governor power to reprieve and section 11 of article VI vests this court with appellate jurisdiction in cases in which the death penalty has been imposed. None of these provisions can be construed as an affirmative exemption of capital punishment from the compass of the cruel or unusual punishment clause of article I, section 6.

The provisions of sections 6 and 13 of article I which recognize the existence of capital punishment were carried over into the Constitution of 1879 from the Constitution of 1849. Section 8 of article I was added in 1879 in a modification which discarded the former requirement that the prosecution in capital and other infamous crimes proceed by indictment and permitted instead the use of an information.

The Governor's power to reprieve also originated in the 1849 Constitution as section 13 of article V. It became part of section 1 of article VII of the 1879 Constitution, and, in 1966 was incorporated into the present section 8 of article V. This court was given appellate jurisdiction of all felonies by the Constitution of 1849, and by the Constitution of 1879 as originally adopted, but in 1904 an amendment to section 4 of article VI transferred direct appellate jurisdiction in criminal cases other than those in which the death penalty had been imposed to the Courts of Appeal. The 1966 constitutional revisions shifted the amended provision to the present section 11 of article VI. These 1966 constitutional revisions did not ratify the death penalty as a permissible means of punishment not governed by the cruel or unusual punishment clause of article I, section 6, for the revisions were merely part

of a plan to modernize the Constitution of 1879. They did no more than shift from one section to another provisions recognizing the continued existence of the death peanlty in the grant of powers to the judiciary and the executive department. Nothing in the legislative counsel's analysis, in the arguments for and against the revisions, or in the Secretary of State's official description of the ballot measure suggested to the voter that approval of Proposition 1-a in the election of November 8, 1966, would affirm the continuance of capital punishment.[20]

To interpret the adoption of Proposition 1-a or the presence in other provisions of the Constitution of references to capital punishment as intended to bar future judicial consideration of the possible cruel or unusual nature of capital punishment would violate the most elementary rules of constitutional construction. "We do not . . . approve of that principle of constitutional construction, which seeks by vague surmises, or even probable conjecture, or general speculation of a policy not distinctly expressed, to control the express language of the instrument; since such a mode would not un-

[20]The official description of proposition 1-a advised: "Legislative Constitutional Amendment. Repeals, amends, and revises various provisions of Constitution relating to separation of powers, and to the legislative, executive, and judicial departments; provides for annual general legislative sessions; provides compensation of members of legislature shall be prescribed by statute passed by two-thirds vote, and limits rate of annual future adjustments; Legislature must enact law as prohibiting members from engaging in conflicting activities. Signature necessary on petition for initiative statute reduced from 8% to 5%; eliminates initiatives to Legislature. Legislature shall provide for succession to the office of Governor in event of disability or vacancy." (Jordan, Proposed Amendments to Constitution, Propositions and Proposed Laws together with Arguments To Be Submitted to the Electors of the State of California at the General Election Tuesday, Nov. 8, 1966 (1966) p. 1.)

frequently change the instrument from what its framers made it, into what the Judges think it should have been." (*People v. Weller* (1858) 11 Cal. 77, 86.)) The Constitution expressly proscribes cruel or unusual punishments. It would be mere speculation and conjecture to ascribe to the framers an intent to exempt capital punishment from the compass of that provision solely because at a time when the death penalty was commonly accepted they provided elsewhere in the Constitution for special safeguards in its application.

The Judicial Function

Having determined that under the California Constitution capital punishment is prohibited if it is either a cruel or an unusual punishment, and that no constitutional impediment exists to restrain our examination of the death penalty in light of contemporary standards, we must also define the role of the courts in giving effect to the cruel or unusual punishments clause of article I, section 6.

Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility. It is a mandate of the most imperative nature. Called upon to decide whether the death penalty constitutes cruel or unusual punishment under the Constitution of this state, we face not merely a crucial and vexing issue but an awesome problem involving the lives of 104 persons under sentence of death in California, some for as long as 8 years. There can be no final disposition of the judicial proceedings in these cases unless and until this court has decided the state constitutional question, a question which cannot be avoided by de-

ferring to any other court or to any other branch of government.

The cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to protect fundamental individual and minority rights against encroachment by the majority. It is the function of the court to examine legislative acts in light of such constitutional mandates to ensure that the promise of the Declaration of Rights is a reality to the individual. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141 [93 Cal.Rptr. 234, 481 P.2d 242].) Were it otherwise, the Legislature would ever be the sole judge of the permissible means and extent of punishment and article I, section 6, of the Constitution would be superfluous.

Speaking of the Eighth Amendment to the United States Constitution, the United States Supreme Court declared: "While the State has the power to punish, the Amendment stands to assure that this right be exercised within the limits of civilized standards." (*Trop v. Dulles* (1958) 356 U.S. 86, 100 [2 L.Ed.2d 630, 642, 78 S.Ct. 590].) The cruel or unusual punishment provision of the California Constitution serves an identical purpose. The Legislature is thus accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime, but the final judgment as to whether the punishment it decrees exceeds constitutional limits is a judicial function. (*Weems v. United States* (1910) 217 U.S. 349, 379 [54 L.Ed. 793, 803, 30 S.Ct. 544].)

Respondent, while conceding the power and responsibility of the court to review penal statutes in light of

article I, section 6, urges that we must accept as controlling indicia of contemporary civilized standards of decency both legislative acts creating new capital crimes and legislative acquiescence in the continuation of capital punishment. Although we accord great deference to the judgment of the Legislature in this respect, we would abdicate our responsibility to examine independently the question were our inquiry to begin and end with the fact that statutory provisions authorizing imposition of the death penalty have been recently enacted or continue to exist. (*People v. Lynch* (1875) 51 Cal. 15, 25-26.)

The Prior California Decisions

Although we have often considered challenges to the constitutionality of capital punishment, we have heretofore approached the question in the Eighth Amendment context of "cruel *and* unusual" punishment, using that term interchangeably with the "cruel *or* unusual" language of article I, section 6, of the California Constitution,[21] and have never independently tested the death penalty against the disjunctive requirements of the latter. As a consequence of this emphasis on the Eighth

[21]The constitutionality of a particular mode of punishment appears to have been first considered by this court in *State v. McCauley* (1860) 15 Cal. 429, in which it was sought to enforce the defendant's contractual obligation to pay for the lease of prison labor. He sought to avoid payment on various grounds, among them on the asserted ground that the act authorizing the lease was void. Rejecting that argument, the court stated: "The only limitation [on the Legislature's power to fix punishments for crime] is the inhibition against the infliction of cruel *and* unusual punishments, which are held to mean those of a barbarous character, and unknown to the common law." (15 Cal. at p. 455; italics added.) In *Ex Parte Mitchell* (1886) 70 Cal. 1, however, we upheld a two-year prison term and $4,000 fine for assault with a deadly weapon, stating it was "not excessive, cruel or unusual within the meaning of section 6, article I, of the Constitution." (70 Cal. at p. 2.)

Amendment approach the majority of our prior opinions have focused on justifications for continuation of the death penalty which were then believed to exempt it from the federal constitutional prohibiton of cruel and unusual punishment without regard to whether it was cruel. This disregard of the cruelty question is understandable when it is realized that at the time article I, section 6, was drafted in 1849,[22] and when it was readopted in 1879,[23] capital punishment was not con-

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[22]On September 11, 1849, L. W. Hastings, an attorney delegate from the Sacramento District, introduced the following resolution: "As the true design of all punishment is to reform and not to exterminate mankind, death shall never be inflicted as a punishment for crime in this state."

The reporter recorded the debate: "Mr. McCarver seconded the resolution [to ban capital punishment] not because he believed the House would adopt it, or that it could be adopted here, but because he considered the question entitled to a fair consideration. If the [sponsor] would devise a plan by which criminals could be properly punished in this country, he would go with him; but as California is situated at present, it is impracticable. The construction of penitentiaries would be enormously burdensome. . . . As to the right to take human life, it is very questionable whether we have that right; but as it has been a practice ever since the world was created, perhaps it would be as well to let it rest a while longer. It may be that it is a good old principle established by the experience of ages. He would vote against the resolution, not because he was opposed to it, but because he considered it impracticable to accomplish the object under existing circumstances." (1849 Debates, pp. 45-46.)

[23]In 1879, opinion among the delegates was still mixed. See footnote 18, *supra*. One delegate opposing a resolution which would have expressly declared whipping to be acceptable, suggested that hanging was so cruel as to be permitted only under a "strained construction" of what is now article I, section 6. He stated: "I hold that under the operation or under a strict construction of that provision of the Constitution—'nor shall cruel or unusual punishment be inflicted'—I hold that no man can be hanged, because who will assert that to take a man and drag him up and let him choke to death is not cruel? We all know that it is cruel. There can be nothing more cruel conceived by the mind of man. It is torture the most horrible. And yet it is

sidered so cruel as to warrant proscription, and was a widely accepted, customary punishment in the fledgling state. Hanging had been a popular form of vigilante justice[24] and even after the new state instituted a judicial and penal system, public executions continued.[25] Thus, at the time of our earliest decisions upholding capital punishment, a substantial proportion of California's residents had witnessed executions. It was not a remote or abstract concept, and the question as to whether capital punishment might violate standards of decency then accepted or shock the conscience of the people of that time did not often arise. When it did, the question could be summarily disposed of by a court which then understandably assumed that capital punishment was not so cruel as to be proscribed by the state or federal Constitutions. Since the cruelty of capital punishment was not then a substantial issue, any doubts as to the constitutionality of the death penalty were resolved by resorting to its continuing and unusual acceptance. The emphasis of our prior opinions was thus placed on the common or usual rather than the "cruel" aspect of the punishment.

One J. W. Finley appears to have been the first defendant to challenge the death penalty in California

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done. But it is done under a strained construction of that provision; . . ." (1879 Debates, p. 244.)

Mr. Blackmer, of San Diego County, questioned: "It is stated here that we have a right to take life under the law, and it is admitted on all hands that it is a cruel punishment. I want to ask the gentleman if it deters from the crime of murder. Does the fact that we have the right, and that that law is carried out in many instances, deter people from committing that crime of murder? Not at all." (*Id.* p. 245.) Not all delegates agreed, however, that the death penalty was cruel.

[24]3 Hittell, *supra*, pages 274, 277-278.

[25]Public executions were not abolished until 1858. (Stats. 1858, p. 192, § 1, Now Pen. Code, § 3603.)

on grounds that it violated article I, section 6, of the California Constitution. A life prisoner at Folsom, he had committed a malicious assault on another prisoner, an offense punishable by death. While awaiting trial he challenged the then applicable Penal Code section (Pen. Code, § 246; now Pen Code, § 4500) on constitutional grounds. The Court of Appeal rejected his challenge, answering its own question "Is the punishment cruel or unusual," by justifying it as among the "severe penalties . . . necessary to deter men from defying law and daring the consequences." (*In re Finley* (1905) 1 Cal.App. 198, 201 [81 P. 1041].) The *Finley* court adopted an "excessive" or "disproportionate" test by which to judge whether a punishment was "unusual" and concluded that "only when the punishment is out of all proportion to the offense, and is beyond question an *extraordinary penalty* for a crime of *ordinary gravity committed under ordinary circumstances,* that courts may denounce it as *unusual.*" (1 Cal.App. 198, 202; italics in original.) The court, perhaps mindful of our decision in *Ex Parte Mitchell, supra,* 70 Cal. 1, in which we had used the disjunctive language of article I, section 6, did purport to separately consider whether the penalty was "cruel," but instead of examining that question independently, assumed that the death penalty could not be "cruel *per se,* for the whole current of law for centuries justifies the infliction." (*Ibid.*) Thus, California adopted the cruel *and* unusual punishment approach which has been followed by the United States Supreme Court, of finding justification for capital punishment in its deterrent effect, and weighing only whether it was an excessive or unusual punishment, without independent consideration of whether it is cruel.

When Finley appealed to this court after his conviction, he did not claim that the death penalty constituted cruel or unusual punishment. Instead, he challenged the imposition of the death penalty for malicious assault on equal protection grounds, claiming that there was no justification for imposing such a severe penalty on life prisoners when others who committed the same offense were treated more leniently. We rejected the equal protection claim on the dual ground that the distinction was reasonable because it was necessary to have a more severe punishment to deter life prisoners, and because since they were already serving life terms no greater punishment could be imposed except death. (*People v. Finley* (1908) 153 Cal. 59 [94 P. 248].)

Although Finley did not directly challenge the death penalty in this court on cruel and unusual punishment grounds, the approaches to its constitutionality taken by the Court of Appeal in the first *Finley* case and by this court in the second *Finley* case became firmly established in California law in 1909 when we rejected a second challenge to the infliction of the death penalty for aggravated assault by a life prisoner. Jacob Oppenheimer, a life prisoner at San Quentin, undeterred by the existence of the penalty, assaulted another prisoner in the prison dining room with a knife. He was convicted, the death penalty was imposed, and, on appeal to this court, he contended that then section 246 of the Penal Code was unconstitutional. Citing our prior *Finley* opinion, we noted that the validity of the section had been upheld against an equal protection challenge. But Oppenheimer had also claimed that the death penalty constituted cruel or unusual punishment. Although we recognized that "'cruel' or 'unusual'" punishments were barred by section 6 of article I of

the California Constitution, we did not examine the possiblity that capital punishment might be cruel. Instead we delcared: "The infliction of the death penalty by any of the methods ordinarily adopted by civilized people, such as hanging, shooting, or electricity, is neither a cruel nor unusual punishment (see *In re Kemmler,* 136 U.S. 447 . . .) unless perhaps it be so disproportionate to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally, 'as to shock the moral sense of the people.' [Citation.] In view of what is said in *People v. Finley,* as to the reasons for such provision . . . , we are of the opinion that no such conclusion can be reached in regard to the statute under consideration." (*People v. Oppenheimer* (1909) 156 Cal. 733, 737-738 [106 P. 74].) By adopting what had originally been the basis for rejecting an equal protection challenge to the death penalty, we established justification, proportionment to the offense, and common practice among civilized peoples, as the tests by which to measure capital punishment against constitutional challenge, notwithstanding the alternative criteria of cruel *or* unusual punishments established by section 6, article I, of the California Constitution. Since the death penalty furthered a permissible purpose of punishment, was commonly practiced among civilized people, and was not disproportionate to the offense, it did not offend the Constitution.

The majority of challenges to the death penalty in this state since *Oppenheimer* have been rejected either without further exploration of the cruel or unusual punishment question, or by finding justification for continuance of capital punishment. (E.g., *People v. Lazarus*

(1929) 207 Cal. 507, 514 [279 P. 145] ["It is not necessary to cite authorities for the purpose of showing that this contention has uniformly been held to be unmeritorious"]; *In re Wells* (1950) 35 Cal.2d 889, 895 [221 P.2d 947] ["We are convinced that [*Oppenheimer*] was correctly decided. (See also *In re Finley* (1905) 1 Cal.App. 198, 203 . . . .)"]; *People v. Bashor* (1957) 48 Cal.2d 763 [312 P.2d 255] [citing *Lazarus and Wells*].)

When justifications offered in support of continuance of the death penalty were more recently challenged, we continued to uphold it on the ground that it had long been practiced and its application upheld, without, however, independently reexamining the question of the cruelty of the punishment in the reality of present day conditions. (*In re Anderson, supra*, 69 Cal.2d 613, 631.) Although our decision in *Anderson* turned largely upon the issue of lack of standards, and we did in that case comment upon the issue of cruel or unusual punishment, we examined the issue on the basis of the conjunctive cruel *and* unusual punishment. Thus our approach heretofore has paralleled that of the United States Supreme Court in rejecting challenges brought under the Eighth Amendment in finding justification for capital punishment and upholding it if it is not disproportionate to the offense. (See Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional* (1970) 83 Harv.L.Rev. 1773, 1784-1798.)

Now, however, as the California constitutional history demonstrates, we must probe the issue on the basis of the disjunctive cruel *or* unusual punishment.

The Constitutionality of Capital Punishment Today

Well over a century has now passed since the day when vigilante justice and public hangings made executions an accepted practice of California life. We cannot today assume, as it was assumed in early opinions of this court, that capital punishment is not so cruel as to offend contemporary standards of decency. Appellant has asked that we not only reexamine the validity of the prior bases upon which the death penalty has been upheld, but that we independently examine its cruelty applying contemporary standards. As we shall discuss at greater length below, we have done so and have concluded that capital punishment is "cruel" as that term is understood in its constitutional sense. We have also, at the instance of both appellant and respondent, reexamined the bases upon which capital punishment has been upheld heretofore. As will appear, we have concluded that the death penalty cannot be justified as furthering any of the accepted purposes of punishment. Moreover, we have concluded that it can no longer escape characterization as an "unusual" punishment.

1. *The Constitutional Meaning of Cruelty*

Respondent contends that a punishment is constitutionally proscribed only if it is both unnecessarily cruel and is unusual. We have already concluded, however, that the California Constitution prohibits either cruel *or* unusual punishments, and have indicated that we believe capital punishment to be cruel in the constitutional sense. We have not had occasion heretofore to consider whether a cruel punishment can avoid the proscription of article I, section 6, upon a showing that it is "necessary." Before examining the validity of that

proposition, we shall set forth our reasons for concluding that capital punishment is cruel in the constitutional sense.

It merits emphasis that in assessing the cruelty of capital punishment under article I, section 6, we are not concerned only with the "mere extinguishment of life," which the United States Supreme Court has suggested does not violate the Eighth Amendment (*In re Kemmler* (1890) 136 U.S. 436, 447 [34 L.Ed. 519, 524, 10 S.Ct. 930]), or with a particular method of execution (cf. *Francis v. Resweber* (1947) 329 U.S. 459, 463-464 [91 L.Ed. 442, 426-427, 67 S.Ct. 374]; *In re Kemmler, supra,* 136 U.S. 436, 444-449 [34 L. Ed. 519, 523-525]; *People v. Daugherty* (1953) 40 Cal. 2d 876, 894-896 [256 P.2d 911]), but with the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use. Our concern is that the execution which ultimately follows pronouncement of the death sentence has in fact become the "lingering death" which the *Kemmler* court conceded would be cruel in the constitutional sense. (*In re Kemmler, supra,* 136 U.S. 436, 447 [34 L.Ed. 519, 524].)

We do not interpret the constitutional prohibition of cruel or unusual punishments either as a license for the indefinite continuance of all punishments known to the common law or practiced at the time California attained statehood, nor as a proscription of innovative types of punishment whose purpose is the rehabilitation or reformation of criminal offenders. Historical analysis suggests that the framers intended to outlaw both cruel punishments and punishments of excessive severity for ordinary offenses. They used the term cruel in its

ordinary meaning—causing physical pain or mental anguish of an inhumane or torturous nature.

The framers of the California Constitution sought to restrict their fellow Californians' zeal for devising novel and torturous punishments.[26] Our first opinion construing article I, section 6, equated "cruel" with "barbarous." (*State v. McCauley, supra,* 15 Cal. 429, 455.) It has been suggested that the English Bill of Rights of 1689, which contained language identical to that of the Eighth Amendment,[27] and was the apparent precursor of similar provisions in most state constitutions, did not prohibit cruel, barbarous, or torturous punishments, but only excessive or illegal punishments.[28] It is clear, however, that in this country the phrase was understood to encompass the former and to prohibit both new forms of physical cruelty and existing punishments which courts might later hold to be cruel. Delegates to the various state conventions called to ratify the federal Constitution expressed concern that it contained no provision to ban "tortures, or cruel and barbarous punishments,"[29] or "cruel and unheard-of punishments."[30] At least one congressman, Samuel Livermore

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[26]See footnotes 17 and 18, *supra.*

[27]1 Schwartz, The Bill of Rights: A Documentary History ((1971) 41-43 (hereinafter "Schwartz").

[28]Granucci, "*Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning* (1969) 57 Cal.L.Rev. 839.

[29]Patrick Henry in the Virginia Ratifying Convention, 1788, in 2 Schwartz, *supra,* at page 799. "What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of . . . torturing, to extort a confession of the crime. . . . We are then lost and undone."

[30]Massachusetts Convention Debates, 1788, in 2 Schwartz, *supra,* at pages 690-691. "They are nowhere restrained from in-

of New Hampshire, recognized that the proposed Bill of Rights might result in some existing punishments being outlawed. During the 1789 debates in the House of Representatives he questioned the cruel and unusual punishments clause on the ground that: "villains often deserve whipping, and perhaps even having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?"[31]

We are mindful, too, that article I, section 6, like the Eighth Amendment, is not a static document. Judgments of the nineteenth century as to what constitutes cruelty cannot bind us in considering this question any more than eighteenth century concepts limit application of the Eighth Amendment. The United States Supreme Court recognized that the Eighth Amendment might be interpreted progressively when it said in *Weems v. United States, supra,* 217 U.S. 349, 378 [54 L.Ed. 793, 803], that: "The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and it not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." And a plurality of the court implemented that suggestion in *Trop v. Dulles, supra,* 356 U.S. 86, 101 [2 L.Ed.2d 630, 642], when it adopted as the measure of acceptable punishment under the Eighth Amendment "the evolving standards of decency that mark the progress of a maturing society." (See also, *Robinson v. California* (1962) 370 U.S. 660, 666 [8 L.Ed.2d 758, 762, 82 S.Ct. 1417].)

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venting the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline."

[31] 2 Schwartz, *supra,* pages 1053, 1112.

Were the standards of another age the constitutional measure of "cruelty" today, whipping, branding, pillorying, severing or nailing ears, and boring of the tongue, all of which were once practiced as forms of punishment in this country, might escape constitutional proscription, but none today would argue that they are not "cruel" punishments. Thus, although respondent argues that the standard of cruelty today is no different from what it was when article I, section 6, was adopted, our responsibility demands that we must construe that provision in accordance with contemporary standards. We have recognized before that our Constitution is a progressive document (*People v. Western Air Lines, Inc., supra,* 42 Cal.2d 621, 635) and, in the context of article I, section 6, have accepted the *Trop* formulation of "evolving standards of decency that mark the progress of a maturing society" (*People v. Clark* (1970) 3 Cal.3d 97, 99 [89 Cal.Rptr. 253, 473 P.2d 997]) as an appropriate expression of the applicable standard. In reality, however, we think the dispute as to the standard to be more apparent than real for the standard today is the standard of 1849 and 1879—whether the punishment affronts contemporary standards of decency. The framers of our Constitution, like those who drafted the Bill of Rights, anticipated that interpretation of the cruel or unusual punishments clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be inflicted.[32]

Respondent also contends, however, that capital punishment does offend contemporary standards of decency. The People find evidence that it does not do

[32]See footnote 18, *supra.*

so in public opinion polls, in the willingness of juries to impose the death penalty, and in the statutes of the 41 states which contain provisions for the punishment of death.[33] Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants. Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it evenhandedly applied to a substantial proportion of the persons potentially subject to execution. Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency. This repudiation has become so apparent that the National Crime Commission reported to the President that: "The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries, and governors are becoming increasingly reluctant to impose, or authorize the carrying out of a death sentence. . . . In a few states in

[33]Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin have abolished capital punishment. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No., 45 (August 1969) *Capital Punishment 1930-1968* page 30 (hereinafter "NPS Bulletin No. 45").

which the penalty exists on the statute books, there has not been an execution in decades." (President's Commission on Law Enforcement and Administration of Justice, Report (1967) (The Challenge of Crime in a Free Society) p. 143.)

What our society does in actuality belies what it says with regard to its acceptance of capital punishment. Between 1930 and 1968, a total of 3,859 persons were executed in the United States as punishment for crimes ranging from murder to burglary and aggravated assault.[34] The steady decrease in the number of executions from a high of 199 in 1935 to 2 in 1967,[35] in spite of a growing population and notwithstanding the statutory sanction of the death penalty, persuasively demonstrates that capital punishment is unacceptable to society today.

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto,[36] but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.[37] Penologists and medical ex-

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[34]NPS Bulletin No. 45, *supra*, page 7.

[35]*Ibid.*

[36]See, Comment, *The Death Penalty Cases*, 56 Cal.L.Rev. 1268, 1341, *supra;* Hearings on Senate Bill 1760 Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on March 20, 21 and July 2, 1968 (Published by G.P.O. 1970) page 21.

[37]The median elapsed time prisoners now awaiting execution in California had been imprisoned as of the end of 1968 was 20.7 months. The national median elapsed time was then 33.2 months. The California figures do not take into account prisoners who were awaiting execution at that time but who have since had their sentences commuted, judgments reversed, or have been removed from death row for other reasons. As of December 31, 1968, the median elapsed time condemned prisoners then on

perts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.[38] Respondent concedes the fact of lengthy delays between the pronouncement of the judgment of death and the actual execution, but suggests that these delays are acceptable because they often occur at the instance of the condemned prisoner. We reject this suggestion. An appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription.

The brutalizing psychological effects of impending execution are a relevant consideration in our assessment of the cruelty of capital punishment. The United States Supreme Court recognized in *Weems v. United States*, *supra*, 217 U.S. 349 at page 372, [54 L.Ed. 793 at pp. 800-801], that "it must have come to [the framers of the Eighth Amendment] that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." In *Trop v. Dulles*, *supra*, 356 U.S. 86, in which the United States Supreme Court squarely held a criminal punishment to be vio-

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death row had been awaiting execution was 23.7 months. (NPS Bulletin No. 45, *supra*, p. 27.) There were a total of 104 persons under sentence of death in California as of December 31, 1971. Of these, two prisoners have been on death row since 1964, five since 1965, and seven since 1966. Eight were received there in 1967, fifteen in 1968, and thirteen in 1969. Thirty-four were received in 1970 and the remaining twenty in 1971.

[38]See e.g., Hearings on Senate Bill 1, before the California Senate Committee on the Judiciary (1960) page 9 (1 Sen. J. Appendix (1961)); Hearings on Senate Bill 1760. Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on March 20, 21 and July 2, 1968 (Published by G.P.O. 1970) pages 21, 125; Siferstein, *Crime and Punishment* (1968) 1 The Center Magazine No. 2 84.

lative of the Eighth Amendment, the psychological impact of the punishment was dispositive. The court there held that denationalization as punishment was barred by the Eighth Amendment, stating in the plurality opinion: "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primtive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. . . . In short, the expatriate has lost the right to have rights.

"This punishment is offensive to the cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. . . . It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." (356 U.S. at pp. 101-102 [2 L.Ed. 2d at p. 643].)

Although the court suggested in dictum that it believed the death penalty to be permissible then in certain circumstances, it also emphasized that: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." (*Id.* at p. 100 [2 L.Ed. 2d at p. 642].) The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment. Judged by contemporary standards of decency, capital punishment is impermissibly cruel. It is being increasingly rejected by society and is now almost wholly repudiated

by those most familiar with its processes. Measured by the "evolving standards of decency that mark the progress of a maturing society," capital punishment is, therefore, cruel within the meaning of article I, section 6, of the California Constitution.

2. *The Unnecessary Cruelty of Capital Punishment*

The People concede that capital punishment is cruel to the individual involved. They argue, however, that only "unnecessary" cruelty is constitutionally proscribed, and that if a cruel punishment can be justified it is not forbidden by article I, section 6, of the California Constitution. We need not decide here whether our Constitution permits the infliction of "necessary" cruelty as punishment for crime, because respondent has not demonstrated that the death penalty can be justified as necessary to any state interest.

In seeking to justify continuance of capital punishment, the People argue that it furthers three of the four acknowledged purposes of punishment. Respondent concedes that death is in no way rehabilitative, but contends that capital punishment may be legitimately imposed in retribution for serious offenses, that it serves to isolate the offender, and that the existence of the death penalty acts as a deterrent to crime. None of these purposes is shown to justify so onerous a penalty as death.

Although vengence or retribution has been acknowledged as a permissible purpose of punishment under the Eighth Amendment (*Williams v. New York* (1949) 337 U.S. 241, 248 [93 L.Ed. 1337, 1343, 69 S.Ct. 1079]), we do not sanction punishment solely for retribution in California. (*In re Estrada* (1965) 63 Cal.2d 740, 745 [48 Cal.Rptr. 172, 408 P.2d 948].)

We are fully aware that many condemned prisoners have committed crimes of the utmost cruelty and depravity and that such persons are not entitled to the slightest sympathy from society in the administration of justice or otherwise. Nevertheless, it is incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance.

Admittedly, isolation of the offender from society is a proper and often necessary goal of punishment and death does effectively serve that purpose. Society can be protected from convicted criminals, however, by far less onerous means than execution. In no sense can capital punishment be justified as "necessary" to isolate the offender from society.

Respondent contends that the existence of the death penalty may deter some persons from committing capital offenses. We have recognized that whether a substantial deterrent effect can be proven is a vigorously disputed proposition. (*People v. Love* (1961) 56 Cal.2d 720, 731 [16 Cal.Rptr. 777, 17 Cal.Rptr. 481, 366 P.2d 33]; *People v. Ketchel* (1963) 59 Cal. 2d 503, 538-539 [30 Cal.Rptr. 538, 381 P.2d 394.)[39]

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[39]See, e.g., European Commission on Crime Problems, Council of Europe, The Death Penalty in European Countries (1962) pages 45-46; Massachusetts Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, House Report No. 2575 (1958) at page 44; Ohio Legislative Service Commission, Capital Punishment, Staff Report No. 46 (1961) at pages 43-47; Royal Commission on Capital Punishment Report (1953) paragraph 65, at page 23; Subcommittee of the Judiciary Committee on Capital Punishment, Problems of the Death Penalty and its Administration in California, 20 Assembly Interim Committee Report No. 3 (1955-1957) at pages 27-30; Bedau, *The Question of Deterrence,* in The Death Penalty in America 264-265 (H. Bedau ed. 1964 [hereinafter "Bedau"]; Graves, *The Deterrent Effect of Capital Punishment in California,* in Bedau, *supra,* at page 322;

We are aware of the obvious imponderable and variable characteristics of society which can cause statistical studies of deterrence to be misleading, and of the difficulties inherent in attempting to establish that an offense was not committed because a would-be offender was aware of and restrained by the possibility of the death penalty. Nonetheless, as respondent concedes, many homicides in particular are not deterrable and as to the remainder capital punishment can have a significant deterrent effect only if the punishment is swiftly and certainly exacted. We have already demonstrated that the punishment is not swift. Moreover, it is far from certain.

In California death is authorized as the penalty for eight offenses: treason (Pen. Code, § 37), perjury in capital cases (Pen. Code, § 128) (first degree murder (Pen. Code, § 190), kidnaping for ransom or robbery with bodily harm to the victim (Pen. Code, § 209), train wrecking (Pen. Code § 219), malicious assault by life prisoner (Pen. Code, § 4500), explosion of destructive devices causing great bodily injury (Pen. Code, § 12310), and sabotage resulting in death or great bodily injury (Mil. & Vet. Code, § 1672, subd. (a)). The penalty is mandatory for the treason and perjury offenses and for malicious assault by a life prisoner if a non-inmate victim dies. It is discretionary for the other listed offenses.

Notwithstanding the discretion given to judges and juries to impose either death or life imprisonment for

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Savitz, *The Deterrent Effect of Capital Punishment in Philadelphia*, in Bedau, *supra*, at page 315; Schuessler, *The Deterrent Influence of the Death Penalty* (1952) 284 Annals 54, 62; Sellin, *Homicides in Retentionist and Abolionist States*, in Capital Punishment 135. (T. Sellin ed. 1967 [hereinafter "Sellin"]).

first degree murder,[40] it is estimated that in California 80 percent of those persons convicted receive a sentence of life imprisonment.[41] Of the 20 percent upon whom a sentence of death is imposed, commutation of sentence, reversal of the judgment, and other factors[42] further reduce the number of defendants actually executed to the point where, far from being a certain penalty with acknowledged deterrent effect, capital punishment today is rarely imposed or implemented.

A punishment as extreme and as irrevocable as death cannot be predicated upon speculation as to what

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[40]The death penalty may not be imposed on persons who were under 18 years of age at the time of the offense. (Pen. Code, § 190.1.)

[41]McGee, *Capital Punishment as Seen by a Correctional Administrator* (1964) 28 Fed. Prob. (No. 2) 11, 12. In 1967 there were 88 first degree murder convictions in California and 17 death sentences. (Crime & Delinquency in Cal. 1967 (Bureau of Crim. Statistics Rep. 1968) p. 140; NPS Bulletin No. 42 (1968).) During 1969 there were 87 first degree murder convictions and 8 death sentences. (Crime & Delinquency in Cal. 1969 (Bureau of Crim. Statistics Rep. 1970) p. 121.) The ratio of death sentences to first degree murder convictions does not adequately reflect the uncertainty of imposition of capital punishment, however. This uncertainty is better exemplified by the rarity of the death sentence in California in relation to the total number of wilful homicides. In 1969 California experienced a record 1,376 wilful homicides. (Crime and Delinquency in Cal. 1970 (Bureau of Crim. Statistics Rep. 1971) p. 5.) In 1970 there were 1,359 wilful homicides. (*Ibid.*) There were 1,790 arrests in 1969 and 1,807 arrests in 1970 for all categories of homicide. (Crime & Delinquency in Cal.—Crime and Arrests 1970 (Reference Tables, Bureau of Crim. Statistics 1971) p. 5.) Yet, in all of 1969, 1970 and 1971 a total of only 67 persons were sentenced to death.

[42]Death from natural causes, suicide, and insanity (Pen. Code, § 3704). During the period 1965-1971, 60 percent or 66 death penalty appeals resulted in reversals of the entire judgment or of the penalty. In addition, 19 extraordinary writs were granted setting aside the penalty or the entire conviction and requiring new trials or further proceedings for each defendant.

the deterrent effect might be if it were actually applied swiftly and with certainty upon all who were potentially subject to it. As stated previously, in reality today it is neither swift nor certain. Respondent offers us no basis upon which to conclude that, as presently administered, capital punishment is any greater deterrent to crime than are other available forms of punishment.

3. *Capital Punishment is an Unusual Punishment*

We have already noted that the death sentence is rarely imposed in California today and that it is even more rarely carried out. But even adopting the broader test of widespread acceptance among civilized peoples, capital punishment can no longer withstand constitutional proscription. Respondent seeks to avoid this conclusion by suggesting that a punishment is not unusual in the constitutional sense unless it is unusual as to form, or method by which it is imposed. We cannot accept this limitation of the meaning of "unusual," however, for to do so would ignore the fact that execution is a form or method of punishment and would embroil us in future semantic disputes as to whether innovative types of punishment were unconstitutionally "unusual" forms of punishment.

In construing article I, section 6, we have held that an excessive or disproportionate punishment is "unusual." (*People v. Oppenheimer, supra,* 156 Cal. 733, 737-738.) When a punishment has been challenged as being unconstitutionally "cruel," however, the fact that it was not literally "unusual" has been considered

relevant, not to whether the punishment should be proscribed as excessive, but as to whether it was offensive to the standards of decency common to civilized peoples. (*In re Finley, supra,* 1 Cal. App. 198, 202.) Thus, when doubt existed as to whether a punishment was so cruel as to contravene article I, section 6, that doubt could be resolved in favor of upholding the punishment if it was commonly accepted among civilized societies not limited to our own.

We have concluded that capital punishment is unconstitutionally cruel and that under article I, section 6, a cruel punishment is proscribed irrespective of whether it is excessive. If any doubt remained as to its cruelty, however, we could no longer uphold capital punishment on the ground that it is commonly accepted, for the repudiation of the death penalty in this country is reflected in a world-wide trend toward abolition.

Not only have nine states, Puerto Rico and the Virgin Islands totally abolished capital punishment, but New Mexico, New York, North Dakota, Rhode Island and Vermont have limited its application to exceptional circumstances. Among those American jurisdictions which permit it at all, 14 have not conducted an execution since 1960, 19 have had none since 1961, 24 have had none since 1962, 30 have had none since 1963, and 35 have had none since 1964. In 1967 California and Colorado each executed one person. Prior to 1967 California had not had an execution since 1963 when one person was executed.[43] The increasingly unusual

[43]NPS Bulletin No. 45, *supra,* pages 8-9.

nature of capital punishment in the United States is readily apparent in the following chart:

Total Number of Executions in the United States

1930—155	1963—21
1935—199	1964—15
1940—124	1965— 7
1945—117	1966— 1
1950— 82	1967— 2
1955— 76	1968— 0
1960— 56	1969— 0
1961— 42	1970— 0
1962— 47	1971— 0

The observation of the National Crime Commission that the infrequency of its application is the most salient characteristic of capital punishment in the United States is echoed in the report of the Secretary General of the United Nations on the world-wide status of capital punishment. "There is still a clear trend toward total abolition. Most countries are gradually restricting the number of offenses for which the death penalty can be applied and a few have totally abolished capital offenses even in wartime. Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority. . . ." (United Nations, Economic and Social Council. Note by the Secretary General, Capital Punishment (E/4947) (February 23, 1971) p. 3.) Defendant has prepared the following table demonstrating the extent of de jure and

de facto abolition of capital punishment in foreign jurisdictions:[44]

Worldwide Abolition

Argentina	1922	Liechtenstein	1789
Australia (Federal)	1945	Luxembourg	1821
New South Wales	1955	Mexico (Federal)	1931
Queensland	1922	29 of 32 states	1931–1970
Tasmania	1968	Monaco	1962
Austria	1968	Mozambique	1867
Belgium	1863	Nepal	1950
Bolivia	1961	Netherlands	1886
Brazil	1946	Antilles	1957
Canada	1967	New Zealand	1961
Colombia	1910	Nicaragua	1892
Costa Rica	1880	Norway	1905
Denmark	1930	Panama	1915
Dominican Republic	1924	Portugal	1867
Ecuador	1897	San Marino	1848
Finland	1949	Surinam	1927
Germany, West	1949	Sweden	1921
Greenland	1954	Switzerland	1942
Honduras	1957	United Kingdom	
Iceland	1940	Great Britain	1965
India		Northern Ireland	1966
Travencore	1944	Uruguay	1907
Israel	1954	Vatican City State	1969
Italy	1944	Venezuela	1863

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[44]Sources for this table are: United Nations, Secretary-General's Note, *supra;* Ancel, The Death Penalty in European Countries (Council of Europe, European Committee on Crime Problems 1962); Joyce, Capital Punishment: A World View (1961); University of Coimbra, Faculty of Law, Pena do Morte (1967); Patrick, *The Status of Capital Punishment: A World Perspective* (1965) 56 J. Crim. L.C. & P.S. 397, 405. Included among the abolitionist jurisdictions are nine which retained capital punishment for certain extraordinary civil offenses (Canada, Israel, Nepal, New Zealand, the United Kingdom, and the Australian jurisdictions); eight which permit it under military law or in wartime (Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden, and Switzerland), of which two executed Nazi collaborators after the Second World War (Netherlands and Norway). Belgium executed one soldier in 1918.

The dates shown are those of de jure abolition except for Liechtenstein, Luxembourg, Nicaragua, and Surinam, in which the date represents that of the last execution and the beginning

No longer can it be said that capital punishment is not "cruel *per se*, for the whole current of law for centuries justifies its infliction." (*In re Finley, supra,* 1 Cal.App. 198, 202.) Although world-wide acceptance of capital punishment at the turn of the century may then have warranted resolving doubts as to its cruelty in favor of its constitutionality, the current has now reversed. It is now, literally, an unusual punishment among civilized nations.

Conclusion

We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members. Lord Chancellor Gardiner reminded the House of Lords, debating abolition of capital punishment in England: "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self respect." (268 Hansard, Parlimentary Debates (5th Se-

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of de facto abolition, with the exception of Luxembourgh which had one later execution.

The Canadian statute abolishing capital punishment for murder expires five years from the date of its enactment if not renewed.

ries) (Lords, 43d Parl., First Sess., 1964-1965 (1965) p. 703.)

Insofar as Penal Code sections 190 and 190.1 purport to authorize the imposition of the death penalty, they are, accordingly, unconstitutional. In view of our decision that the death penalty may not be carried out, it is unnecessary to reach petitioner's other contentions relating to the validity of the penalty judgment.

The judgment, insofar as it provides for the penalty of death, is modified to provide a punishment of life imprisonment and as so modified is affirmed in all other respects.[45]

Peters, J. Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

McCOMB, J.—I do not concur in this court's judgment, but would affirm the ruling of the trial court, for these reasons:

First: The question here involved is now pending before the Supreme Court of the United States, whose decision will be binding upon this court. Therefore, I would not pass upon the merits of the contentions discussed in the foregoing opinion until the decision of the Supreme Court has been rendered.

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[45]Inasmuch as today's decision is fully retroactive, any prisoner now under a sentence of death, the judgment as to which is final, may file a petition for writ of habeas corpus in the superior court inviting that court to modify its judgment accordingly. Petitions should be filed in the court of territorial jurisdiction in the first instance, and transferred by that court to the sentencing court in the event the court with territorial jurisdiction was not the sentencing court.

Second: In my opinion, the death penalty is constitutional, as held by this court in a long line of cases, including the following decisions handed down within the past three and a half years: *People v. St. Martin*, 1 Cal.3d 524, 538-539 (19, 20) [83 Cal.Rptr. 166, 463 P.2d 390]; *In re Hill*, 71 Cal.2d 997, 1020 [11] [80 Cal.Rptr. 537, 458 P.2d 449]; *People v. Williams*, 71 Cal.2d 614, 634 [23] [79 Cal.Rptr. 65, 456 P.2d 633]; *People v. Pike*, 71 Cal.2d 595, 604 [8] [78 Cal.Rptr. 672, 455 P.2d 776]; *People v. Quicke*, 71 Cal.2d 502, 523 [20] [78 Cal.Rptr. 683, 455 P.2d 787 *People v. Mabry*, 71 Cal.2d 430, 444 [15] [78 Cal. Rptr. 655, 455 P.2d 759]; *People v. Vaughn*, 71 Cal. 2d 406, 418 [5] [78 Cal.Rptr. 186, 455 P.2d 122]; *People v. Nye*, 71 Cal.2d 356, 377 [20] [78 Cal.Rptr. 467, 455 P.2d 395]; *In re Arguello*, 71 Cal.2d 13, 16 [76 Cal.Rptr. 633, 452 P.2d 921]; *People v. Hill*, 70 Cal.2d 678, 700-701 [76 Cal.Rptr. 225, 452 P.2d 329]; *In re Anderson*, 69 Cal.2d 613, 629-632 [73 Cal. Rptr. 21, 447 P.2d 117].)[1]

Third: Further, the death penalty serves a useful purpose as a deterrent of crimes which result in the death of innocent victims and should therefore not be

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[1]In my opinion, the fact that for thousands of years death has been accepted as a proper punishment for the most serious criminal offenses indicates that it is neither a cruel punishment (when effected by means such as those used in this state) nor an unusual punishment.

In the Holy Bible, it is stated: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." (Genesis, ch. 9, v. 6.) The foregoing quotation shows that the death penalty has long been regarded by us and our predecessors as an appropriate punishment for a person who commits murder.

abolished.[2] An article entitled "A Wistful Goodbye to Capital Punishment" by Donald Atwell Zoll, Professor of Political Science at Arizona State University, published in the December 3, 1971, issue of *National Review* at pages 1351-1354, convincingly states the reasons it would be wise to retain the death penalty.[3]

Fourth: Subject to constitutional limitations, the Legislature has the power to prescribe punishment for crime. (*People v. Bauer*, 1 Cal.3d 368, 375 (7) [82 Cal.Rptr. 357, 461 P.2d 637, 37 A.L.R.3d 1398]; *In re Anderson, supra*, 69 Cal.2d 613, 630-631 [8].)

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[2]The Honorable B. Rey Schauer, Justice of the Supreme Court of California, has said: "That the ever present potentiality in California of the death penalty, for murder in the commission of armed robbery, each year saves the lives of scores, if not hundreds of victims of such crimes, cannot I think, reasonably be doubted by any judge who has had substantial experience at the trial court level with the handling of such persons. I know that during my own trial court experience, which although not extensive in criminal law, included some four to five years (1930-1934) in a department of the superior court exclusively engaged in handling felony cases, I repeatedly heard from the lips of robbers—some amateurs (no prior convictions), some professionals (with priors) —substantially the same story: 'I used a toy gun [or a simulated gun or a gun in which the firing pin or hammer had been extracted or damaged] because I didn't want my neck stretched.' (The penalty, at the time referred to, was hanging; death by lethal gas was substituted in 1941.)" (*People v. Love*, 56 Cal.2d 720, 739, at p. 744 [16 Cal.Rptr. 777, 17 Cal.Rptr. 481, 366 P.2d 33] fns. omitted).)

[3]As aptly pointed out by Professor Zoll in the conclusion of his article: "Capital punishment ought not to be abolished solely because it is substantially repulsive, if infinitely less repulsive than the acts which invoke it. Yet the mounting zeal for its abolition seems to arise from a sentimentalized hyperfastidiousness that seeks to expunge from the society all that appears harsh and suppressive. If we are to preserve the humane society we will have to retain sufficient strength of character and will to do the unpleasant in order that tranquillity and civility may rule comprehensively. It seems very likely that capital punishment is a . . . necessary, if limited, factor in that maintenance of social tranquillity and ought to be retained on this ground. To do otherwise is to indulge in the luxury of permitting a sense of false delicacy to reign over the necessity of social survival."

As hereinabove indicated, it is my opinion that the death penalty is constitutional, as determined by this court in innumerable cases. Therefore, since it is the duty of the Legislature or the electorate, and not the judiciary to decide whether it is sound public policy to empower the imposing of the death penalty, it is my opinion that if a change is to be made, it should be effected through the legislative process or by the people through the initiative process. (See *In re Anderson, supra,* 69 Cal. 2d 613, 616, 632 [10]; *People v. Tanner,* 3 Cal.2d 279, 298 [44 P.2d 324].)

APPENDIX C

Modification of Opinion

In the Supreme Court of the State of California, in Bank.

The People, Plaintiff and Respondent, v. Robert Page Anderson, Defendant and Appellant. Crim. 13617 (Superior Ct. No. Cr 8039).

Filed Mar. 17, 1972.

BY THE COURT:

The opinion herein is modified by amending footnote 45 on page 657 of 6 Cal.3d to read as follows:

"[45]Inasmuch as today's decision is fully retroactive, any prisoner now under a sentence of death, the judgment as to which is final, may file a petition for writ of habeas corpus in the superior court inviting that court to modify its judgment to provide for the appropriate alternative punishment of life imprisonment or life imprisonment without possibility of parole specified by statute for the crime for which he was sentenced to death. Petitions should be filed in the court of territorial jurisdiction in the first instance and transferred by that court to the sentencing court in the event the court with territorial jurisdiction was not the sentencing court.

The issue of the right to bail in cases in which the law has heretofore provided for the death penalty has been raised for the first time by the People and amici curiae on petition for rehearing. Although this question was never an issue in this case, we deem it appropriate to note that article I, section 6, of the California Constitution and section 1270 of the Penal Code, dealing with the subject of bail, refer to a category of offenses

for which the punishment of death could be imposed and bail should be denied under certain circumstances. The law thus determined the gravity of such offenses both for the purpose of fixing bail before trial and for imposing punishment after conviction. Those offenses, of course, remain the same but under the decision in this case punishment by death cannot constitutionally be exacted. The underlying gravity of those offenses endures and the determination of their gravity for the purpose of bail continues unaffected by this decision. Accordingly, to subserve such purpose and subject to our future consideration of this issue in an appropriate proceeding, we hold that they remain as offenses for which bail should be denied in conformity with article I, section 6, of the Constitution and Penal Code section 1270 when the proof of guilt is evident or the presumption thereof great.

APPENDIX D

Order Denying Rehearing

Order Due March 17, 1972.

Crim. No. 13617

In the Supreme Court of the State of California, in Bank.

People v. Anderson.

Filed Mar. 17, 1972.

Opinion modified.

Respondent's petition for rehearing DENIED.

McComb, J., is of the opinion that the petition should be granted.

Wright
Chief Justice

APPENDIX E

Order Denying Stay.

Crim. No. 13617

In the Supreme Court of the State of California, in Bank.

People v. Anderson.

Filed Mar. 17, 1972.

Respondent's application for stay of issuance of the remittitur is denied. This order is final forthwith.

Wright
Chief Justice